Supreme Court, U.S.
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No. _____

IN THE UNITED STATES SUPREME COURT
OCTOBER TERM, 1998

TERRENCE D. MORGAN,
Petitioner,

vs.

SECRETARY OF DEFENSE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Did the Third Circuit Court of Appeals err as a matter of law in affirming the United States District Court's decision in denying Petitioner's Petition for Attorney's Fees under the Equal Access to Justice Act in that it failed to focus on unconstitutional conduct clearly demonstrated and determined as a matter of fact and found as a matter of fact by the District Court?

2. Did the Third Circuit Court of Appeals err as a matter of law wherein it concluded that the Commanding General's decision was "substantially justified" even though it was based on an erroneous rendition of the historical facts?

3. Did the Third Circuit Court of Appeals err as a matter of law in that it shifted the burden of proof to Petitioner Morgan to disprove that the Government's position was substantially justified?

4. Did the Third Circuit Court of Appeals err in concluding that the Government's litigation position was substantially justified when the Government's litigation attorney knew or had reason to know that the military prosecutor had engaged in deceptive and illegal fabrication of evidence against the Petitioner during the course of the military's investigation into recruiter fraud?

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JURISDICTION

This writ relates to the entry of Judgment of an Order of the United States District Court for the Western District of Pennsylvania dated May 3, 1996, at Civil Action No. 91-1064 which denied Plaintiff's Motion for Attorney's Fees and Costs under EAJA, which was affirmed by the United States Court of Appeals for the Third Circuit by Order entered April 27, 1998 at No. 96-3314.

By Order dated June 23, 1998, the Third Circuit Court of Appeals denied Petitioner's Petition for Rehearing En Banc, with Chief Judge Becker voting for Rehearing.

The Supreme Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

The third issue raised in this Petition for Writ of Certiorari invokes the due process protection provided by the Fifth Amendment of the United States Constitution which reads in relevant part as follows:

> No person shall ... be deprived of life, liberty or property, without due process of law[.]

Each issue raised herein relates to the Court of Appeals' decision to deny Petitioner's request for fees pursuant to the Equal Access to Justice Act. 28 U.S.C. § 2412.

CONCISE STATEMENT OF THE CASE

Master Sergeant Terrence Morgan was a career Marine with a distinguished record. In 1986, he served as the Recruiting Instructor and one of the top non-commissioned officers at Recruiting Station (RS) Pittsburgh. (E 2-7, ¶ 2, 3, 7). RS Pittsburgh had been ranked first in the nation in productivity of Marine recruits. (E 3-5, ¶s 4, 5). In order to preserve its vaunted position against competition from other recruiting stations, members of RS Pittsburgh behaved unscrupulously including by enlisting young people with false diplomas, criminal records, medical problems, and inadequate documentation. (E 7-14, ¶s 10, 11, 12, 13, 14, 15, 16). Sergeant Morgan brought evidence of irregularities to the attention of his commanding officer and was rebuffed. (Id.) Then he took the evidence to his District Command in Philadelphia. (Id.)

During the following investigation by the District Command, Sergeant Morgan became a target. (E 16-17, ¶ 19). Captain Daniel J. Koleos, a military prosecutor was the counsel to the investigation. (E 15, ¶ 18, n.17). Sergeant Morgan was subjected to outrageous tactics during the initial and subsequent investigations including a rigged physical identification, the coerced and later recanted testimony of his colleagues, and a fabricated accusation of a civilian print shop that Sergeant Morgan had created false diplomas, which also was contrived, by Captain Koleos. (E 16-17, 30-38, ¶s 19, 31, 32, 33, 34, 35, 36, 37). These and other shameful acts were brought to the attention of Jarvis D. Lynch, the Commanding General of Paris Island by credible sources including the Naval Investigation Service (NIS). (E 23-25, 40-42, ¶ 25, 26, 27, 39). Later, in the summer of 1989, Sergeant

Morgan was scheduled to face court martial. (E 45-46, ¶ 42). Again Captain Koleos was the prosecutor. The key to Koleos' case was a purported "gray book" allegedly belonging to Sergeant Morgan containing illegal gambling information. (Id). The prosecutor's representation that he possessed this evidence induced Sergeant Morgan to forego his right to a court martial and resign in disgrace with an Other Than Honorable (OTH) discharge. (E 47-48, ¶ 44).

The following day it became apparent that Captain Koleos had lied during plea negotiations. (Id.) The prosecution actually did not have a gray book. Sergeant Morgan, through his military counsel, immediately sought to revoke the OTH discharge. (E 50, ¶ 46). Even Captain Koleos agreed that the Marine should have his court martial. But General Lynch, again willfully blinding himself or ignoring the evidence, nevertheless refused to allow the court martial. (E 51-52, ¶ 47).

Sergeant Morgan filed suit in federal court in 1991. Four years of difficult pretrial litigation and discovery led to an arduous six-week injunctive trial at which he prevailed and proved that the prosecutor had violated the due process guarantees of the Fifth Amendment. Afterwards his counsel applied for attorneys fees under EAJA to compensate it for prevailing in this extraordinarily complex litigation. The District Court denied the request for fees totally, and the United States Court of Appeals affirmed. In the following discussion, Petitioner Morgan will show various ways in which the Court of Appeals' decision was erroneous. Petitioner raised each of the issues raised herein in his Petition for Rehearing En Banc.

REASONS WHY THE WRIT SHOULD BE GRANTED

The trial court's stunningly severe decision on fees violates the purpose of the Equal Access of Justice Act. The legislative history of EAJA makes it evident that the statute was intended as a shield for the individual to use against the overwhelming resources of the federal government. Lundin v. Mecham, 980 F.2d 1450, 1457 (D.C. Cir. 1992) (quoting comments of legislators when enacting EAJA).

The comments of legislators on their passage of EAJA reflect the concerns of the founders. The American system of federalism must above all, check the growth of tyranny of the government over a particular individual:

> If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.

The Federalist Number 51, James Madison.

This classic defense of the separation of powers and the republican process is echoed in the concerns of Congress as it secured to the individual access to the judicial branch for the purpose of obliging the government to control itself.

Congress began the EAJA with a statement of its findings, and noted, as a basis for the legislation, that

individuals might be deterred from seeking review of unreasonable government action because of the expense involved.

Congress not only highlighted the relative positions of power in the case of an individual forced to litigate against the United States, but went on specifically to articulate the object of the EAJA:

> To diminish the deterrent effect of seeking review of, or defending against, governmental action by providing in specified situations an award of attorneys fees, expert witness fees, and other costs against the United States; and (2) to ensure the applicability in actions by or against the United States of the common law and statutory exceptions to the "American Rule" respecting the award of attorneys fees.

Congressional Findings and Purposes, Note following 5 U.S.C. § 504 [footnote omitted]; see also, Commissioner INS v. Jean, 496 U.S. 154, 165, 110 S.Ct. 2316, 2322 (1990).

"The purpose of EAJA was to counterbalance the financial disincentives to vindicating rights against the government through litigation." Sullivan v. Finkelstein, 496 U.S. 617, 630, 110 S.Ct. 2658 (1990). The fee-shifting facet of EAJA was intended to encourage private attorneys general to challenge governmental abuses, a vitally important concern.

When an individual's rights are violated, even though that situation is unique to the person, he should not be made to choose between buckling to an unreasonable

government action or prevailing against it to his financial ruin. The Supreme Court holds this view of EAJA: "Fee awards were intended to address this problem: 'when there is an opportunity to recover costs,' the committee noted, 'a party does not have to choose between acquiescing to an unreasonable government order or prevailing to his financial detriment.'" Ardestani v. INS, 502 U.S. 129, 142, 112 S.Ct. 515, 523 (1991) (citation omitted).

In particular, the Court of Appeals' denial of attorney's fees and costs to Petitioner under EAJA constitutes a chilling effect to aggrieved citizens who believe they have been subjected to abusive and harassing executive branch practices. As Senator DeConcini explained:

> Through the device of fee-shifting, the bill attempts to overcome the financial obstacles which prevent citizens from challenging the unreasonable exercise of Government authority.... It is also intended to affirmatively encourage citizens to challenge actions which they believe to be unreasonable or irresponsible. It recognizes that those who choose to litigate an issue against the Government are not only representing their own vested interest, they are also refining public policy, correcting errors on the part of the Government, and helping to define the limits of Federal authority. In short, people are serving public policy and a public purpose.

703 F.2d at 709.

It is clear from the record that the Marine Corps could not, or would not, address the career-shattering rights violation at hand. The aggrieved individual engaged a law

firm which expended over 2000 hours and prevailed. Such an effort not only would be ruinous, but would not be likely to be duplicated in other situations of big government abuse, unless the purpose of EAJA is realized and fees are allotted.

A. The Court of Appeals' decision was erroneous as a matter of law in that it failed to focus on the unconstitutional conduct.[1]

The Court of Appeals committed an error of law in its EAJA analysis of whether the government's position at the administrative level was "substantially justified."

> When, after prevailing on his constitutional claim, Morgan filed an application for fees and costs under the Equal Access To Justice Act, 28 U.S.C. § 2412 (hereinafter referred to as "EAJA"), the trial court [and Panel] shifted its attention from an examination of the prosecutor's misconduct to General Lynch's refusal of Morgan's request to withdraw his OTH discharge. Through this shift, the constitutional dimensions of this case were lost and became secondary to actions which were several steps removed from the violations giving rise to Morgan's favorable verdict.

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[1] Refer to the Decision of the District Courts for overview of all relevant facts. (App. E).

(F 3-4). ACLU Amicus Brief at 3-4.[2] By so analyzing this case, both the District Court and the Court of Appeals misconstrued Congressional purpose and acted contrary to decisional law requiring a review of the totality of the circumstances in determining whether the Government's position was substantially justified.

By mis-analyzing this issue, the Court of Appeals reached a conclusion directly contrary to Congressional intent in passing the EAJA, and is at odds with Brinker v. Guiffrida, 798 F.2d 661 (3d Cir. 1986) (Mansmann, J.). Congressional intent in enacting EAJA is set forth at length in Natural Resources Defense Council, Inc. v. U.S. Environmental Protection Agency, 703 F.2d 700, 704-713 (3d Cir. 1983).

Sergeant Morgan brought this action because he had been the victim of abuse and unconstitutional conduct by several members of the armed services, including the military prosecutor, Captain Koleos.

The "agency action" Sergeant Morgan challenged included Captain Koleos' proven unconstitutional conduct which induced Sergeant Morgan to submit a request for an OTH discharge. Once he discovered that Captain Koleos actively had misled him about the existence of the "gray book," Sergeant Morgan immediately requested permission to withdraw the request for OTH. The District Court held:

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[2]The Allegheny County [Pennsylvania] Bar Association also submitted an amicus brief to the United States Court of Appeals to the Third Circuit on Petitioner's behalf. (App. G).

> Based on the evidence offered by plaintiff, the court has little difficulty concluding that the conduct of the military prosecutor during the week preceding plaintiff's scheduled trial by general court-martial violated plaintiff's right to procedural due process under the Fifth Amendment. Specifically, the court finds that Captain Koleos engaged in deceptive conduct in connection with the availability of Staff Sergeant Cummings and the ability of the government to gain possession of the gray book. (footnote omitted) The court further finds that such deception was improper, and that it was the determining factor in plaintiff's decision to request an OTH discharge in lieu of trial by general court-martial, violating his right for an opportunity to be heard on the charges against him. (footnote omitted) Accordingly, plaintiff is entitled to a declaratory judgment that defendants violated his right to procedural due process of law under the Fifth Amendment.

(E 59-60, ¶ 55) (emphasis supplied). Sergeant Morgan prevailed in proving wrongful agency action prior to General Lynch's final decision, which simply compounded previous wrongful and unjustified agency action.

By accepting the government's definition of the issue and focusing narrowly on General Lynch's single discrete decision not to permit Morgan to retract the OTH request, the Court of Appeals in essence focused on the government's "straw man."

The courts below artificially separated General Lynch's conduct from that of Captain Koleos, his agent and employee. Koleos conducted the investigations and

prosecution as appointed to do so by General Lynch. General Lynch's decision was not a separate and independent act, but rather was part of a continuum of events initiated by Captain Koleos; misdeeds, including unconstitutional prosecutorial misconduct. (Id.)

In the instant federal case the Government was not the prevailing party on the merits and found itself in the delicate and awkward position of justifying unethical conduct. Yet to date, it successfully has gotten the lower courts to adopt a framework for analyzing EAJA which all but insulates bureaucratic miscreants from the consequences of fee shifting provided that they can pass the buck to a high-level manager such as a general or cabinet secretary for a cursory ratification. Petitioner urges this Court to reexamine this serious situation carefully and to see it for what it is - a seductive and artificial paradigm -- which if widely adopted will thwart the intent of Congress, make constitutional cases against federal agencies all but impossible for all plaintiffs except for well-endowed institutions and individuals, and punitively limit access to courts.

In Brinker v. Guiffrida, the Court of Appeals was faced with a similar dilemma in determining the "substantial justification" of a federal agency's litigation position. In concluding that the District Court's finding was erroneous, Judge Mansmann wrote:

> To avoid an award of attorney's fees to a prevailing party, the government must proffer a justification which is substantial with respect to its position viewed as a totality.

> In this regard, the government's burden is to show that the relationship of the facts and legal theories alleged in support of its position is such that the government is substantially justified in defending against a claim.

798 F.2d at 667 (emphasis supplied).

The Third Court herein failed to consider the "totality" of the agency action at issue. This error was compounded by the fact that Captain Koleos' unconstitutional conduct was integrally related to General Lynch's decision. The Court of Appeals specifically noted:

> Although we in no way minimize the gravity or impropriety of Koleos' conduct, it is clear to us that Koleos' conduct is not the issue before us. Rather, the issue is General Lynch's refusal to allow Morgan to withdraw his request of an OTH discharge and proceed to a general court martial. **The fact that Morgan's request was triggered by Koleos' conduct does not elevate that conduct to the level of agency action under the facts before us nor transform his conduct into the decision that was challenged in the Court. Morgan challenged General Lynch's decision, and that is the agency action that must be substantially justified if Morgan is to be denied fees under the EAJA even though Koleos' conduct formed the basis of Morgan's relief in the District Court.**

Morgan v. Perry, 142 F.3d 670, 686 (3d Cir. 1998) (emphasis added). The relief that Sergeant Morgan obtained from the District Court was based solely on its conclusion that Captain Koleos' unconstitutional conduct

had induced Sergeant Morgan to submit the OTH. It is logically inconsistent for the court on one hand to grant Petitioner relief based on Captain Koleos' unconstitutional conduct, while on the other to conclude that this conduct was not the agency action being litigated. The extensive trial record of evidence of misconduct admitted and deemed relevant by the court further reflects that it did not restrict the inquiry to General Lynch's conduct until the fee petition was filed.

B. The Court of Appeals' decision was erroneous as a matter of law wherein it concluded that General Lynch's decision was "substantially justified" even though it was based on an erroneous rendition of the historical facts.

The Court of Appeals committed further error of law wherein it concluded that General Lynch's decision was "substantially justified" even though he was wrong as a matter of fact in his conclusion that "there was no change" in the underlying facts. As the Court of Appeals stated:

> We must disagree that "nothing had changed." Morgan had learned that the Government did not have his gray book, and apparently believed that the Corps' case against him was seriously compromised without it. Furthermore, when Morgan sought to withdraw his request for the OTH discharge, Lynch knew that Koleos had been accused of misconduct and he knew that the government did not have the gray book in its possession. (142 F.3d at 687).

While blithely citing that "a position can be justified even though it is not correct," the Court of Appeals failed to

consider that:

> [T]he government's burden is to show that the relationship of the facts and legal theories alleged in support of its position is such that the government is substantially justified in defending against a claim. A threshold requirement for meeting this burden is to show that the alleged facts have a reasonable basis in truth. See Brinegar, 741 F.2d at 593.

Brinker, 798 at 667 (emphasis added).

General Lynch's conclusion that "nothing had changed" did not have a reasonable basis in truth. Rather, just the opposite was true and this was well known not only to General Lynch, but to his advisors, Colonel Jones and Captain Koleos, as well as to others. The mantra that a "position can be justified even though it is not correct," does not apply in this situation.[3]

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[3] The agency and General Lynch also failed to investigate the serious charges of unethical conduct and prosecutorial misconduct in 1989. The District Court concluded that despite assurances to Congress following Morgan's OTH, by General A.M. Gray, the Marine Commandant, that General Lynch would head an investigation into Morgan's charges of prosecutorial misconduct, no evidence was presented to show that the agency in fact conducted such an investigation. (E 52-54, ¶ 48, 49, 50). In effect, the Marines thwarted Congressional oversight which necessarily led Morgan to resort to a judicial review of the agency action. In itself this militates in favor of fee shifting. This case could have

C. The Court of Appeals' decision was erroneous, as a matter of law, in that it shifted the burden of proof to Petitioner Morgan to disprove that the Government's position was substantially justified.

It is well established that the government bears the burden of establishing that its position was substantially justified. Washington v. Heckler, 756 F.2d 959, 961 (3d Cir. 1981). To the extent that the Court concluded that a "gray book" in fact existed and the concomitant assumption that Morgan was in fact guilty of engaging in illegal gambling activities, its decision is based on a gross error of fact, constitutes palpable abuse of discretion and erroneously shifted the burden of proof to Morgan to prove that the Government's position was not substantially justified. The Court's presumption that Morgan was aware of his implicit guilt in gambling charges is not supported by the record and, in fact, is contrary to the evidence of record.

Morgan testified that by the time he was accused of illegal gambling, he thought that the "fabrication was never going to stop and I was going to end up in the brig no matter what." (H 8). By the point in time when Morgan submitted the OTH, he fully believed that the government was capable of fabricating a "gray book" to support its claims as it had fabricated evidence against him in the preceding years. (H 14-18). Morgan testified:

Q: Did you have a gray book?

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been unnecessary if the Marines had been forthcoming with Congress.

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A: No, I never had a gray book.

*****

Q: What effect did [the allegation of its existence] have on you?

*****

A: Well, that was, this was just the last straw, this was it. It was quite apparent that the Marine Corps was not going to stop fabricating evidence against me. It is quite apparent that a lot of the evidence has been proven it is fabricated. I was told even if I [won] a general court-martial that I would not be reenlisted and my career was over.

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This was just the last straw. If they had a gray book, either Staff Sergeant Cummings had made it or Captain Koleos had made it. That was my perception. It wasn't going to stop. It wasn't going to end. I couldn't win.

I knew that my career was over. I just, I gave up. I quit. I had a moment of weakness and I just said enough is enough, I just want it all to end.

(Id.)

Morgan's testimony supports the equally plausible inference that he was **not** guilty of illegal gambling, but firmly believed that the Marine Corps had, in fact, fabricated evidence that he had engaged in illegal gambling activities. This conclusion is supported by the following findings of fact by the District Court:

a. A recruit named Michael Lockwood was encouraged to falsely state that Plaintiff had

procured a false diploma for him. (E 16, 37-39).

b. Master Sergeant Cawman of the investigating team accused Plaintiff of having a printing press in his basement, an allegation which Plaintiff claimed was ludicrous. (Id.)

c. In his February 17, 1989 report, Col. Evans made findings of fact that Plaintiff was involved in the procurement of false diplomas for applicants Ballew, Grabowski, Brough, and Robinson. These findings were based on statements taken during that investigation. However, each of these statements was subsequently recanted. (E 22, 29). One witness stated that member of the investigating team stated he wanted to "pin" something on Morgan. (E 36).

d. During the Casey investigation, Captain Koleos falsely reported that Jerry L. Williams, a civilian who owned a print shop in Bedford, Pennsylvania, identified Morgan as an individual who had contacted him about making a false diploma. Subsequently, Mr. Williams denied ever making that statement to Captain Koleos, and in fact refused to sign the Results of Interview form presented to him by Mr. Koleos. (E 25-26, 27 n.33). At trial Captain Koleos testified that Mr. Williams' "could not identify Morgan as a Marine who had requested a false diploma." (Id.) (See, also, E 31-32).

e. Plaintiff was charged with threatening Mr. Williams with economic harm if he did not assist Morgan in making false diplomas. However, Mr. Williams

testified that it was the investigator (Koleos) who threatened him if he did not assist in their investigation. (E 32 n.38).

f. Prior to submitting his OTH, Plaintiff was also aware of a statement by staff Sergeant Cummings (who allegedly had access to the alleged "gray book"), in which he indicated that he was getting "kicked out" of the Marine Corps and that he, "was not going down alone, he was taking other people with him whether they were guilty or not." (E 36-37).

g. With respect to Staff Sergeant Cummings' motivation to falsely implicate Plaintiff, Plaintiff testified that Cummings was a chronic and habitual liar who had psychological problems, that Morgan had brought these facts to the attention of the Commanding Officer of R.S. Pittsburgh, and that Morgan had reported Cummings' illegal drug use. (E 43).

In short, the evidence in the record amply buttressed Sergeant Morgan's reason to believe that Captain Koleos had fabricated the gray book and would use it against him. In fact, Captain Koleos previously had created false evidence. Hence, Sergeant Morgan had a basis to believe that Captain Koleos would continue to contort justice by fabricating a "gray book." The belief of the trial court and the Court of Appeals that Sergeant Morgan truly had a gray book is not substantiated by evidence. It amounts to a presumption in favor of the Government, which was relieved of its legislated burden to prove this alleged fact in order to escape fee shifting.

D. The Court of Appeals erred in concluding that the government's litigation position was substantially justified when government attorneys knew or had reason to know that Captain Koleos had engaged in deceptive and illegal fabrication of evidence against Sergeant Morgan during the course of the military's investigation into recruiter fraud.

The Court of Appeals failed to consider the undisputed facts of record with regard to the insubstantiality of the government's litigation position. The government possessed but disregarded substantial reasons to know that Captain Koleos had engaged in deceptive and illegal fabrication of evidence against Sergeant Morgan during the course of the military's investigation into recruiter fraud.

Major Edward Duffy, the government's trial counsel, attended the deposition of print shop owner Jerry Williams in Cumberland, Maryland, on February 9, 1993. At the deposition which later was read into the trial, Mr. Williams made plain that he had not named Sergeant Morgan to Captain Koleos, despite Koleos' threats, prodding, and obsession with Sergeant Morgan. (I 4-9). Moreover, Williams declined to sign a statement for Captain Koleos implicating Morgan in wrongdoing. (I 8-9).

At the deposition and at trial, Major Duffy, did not and could not impeach Williams in any way (nor was Williams impeached at trial by any other witness). Major Duffy knew or should have known that Captain Koleos, despite his high quasi-judicial responsibility, had fabricated evidence against Sergeant Morgan in the form of the Results of Interview embraced in the Casey Report as

enclosure 20. (K 1).

The trial court's finding of fact at ¶ 33 reveals that the government had full knowledge, prior to trial, that Captain Koleos had attempted to induce Mr. Williams of Precision Printing, to implicate Morgan in illegal conduct despite the fact that Mr. Williams had no evidence in support thereof. Mr. Williams testified that it was Captain Koleos who kept inserting Plaintiff's name into their investigatory conversation. During the course of the investigation, Mr. Williams and his employees unequivocally stated, upon seeing Sergeant Morgan, that he was not the Marine who had come into their shop for the purpose of producing false high school diplomas for recruits.

Moreover, during the course of litigation, the Government's attorney, Albert Schollaert, discovered that Captain Koleos had deceived Sergeant Morgan and his defense counsel, Captain Puleo, during the days immediately preceding Sergeant Morgan's request for OTH and his scheduled court martial.

Captain Koleos' deposition of May 19, 1993 in Miami was attended by Mr. Schollaert, who later also represented the government at trial. In the deposition, Captain Koleos testified to his conduct regarding the gray book. In particular, he stated that he told Captain Puleo, the military defense attorney, that Cummings had the book. But, in deposition Captain Koleos admitted he also had known at the time that Cummings was wavering, sometimes telling Koleos that he (Cummings) had the book and sometimes that he did not. (J 3). In short, at that time of discovery the government knew or should have known of deceptive conduct about the status of evidence that lead to the OTH and to the District Court's finding of

a due process violation.[4] Nevertheless, the Plaintiff was forced to go through the effort and expense of a six week civil rights trial in order to gain relief.

E. This Petition Should be Granted to Correct a Conflict In the Circuits.

The Court's decision in this matter does not harmonize with the decisions of other Circuit Courts of Appeal, or with predominant indications from the Supreme Court. That is, the Panel's decision failed to consider the "totality of the circumstances" in its EAJA analysis.

The Supreme Court in Commissioner INS v. Jean, 496 U.S. 154, 165, 110 S.Ct. 2316, 2322 (1990), did not completely resolve whether to look to the case as a whole in determining whether the government's position was substantially justified. However, this Court surely discourages an issue by issue analysis of the government's posture throughout each phase of litigation:

> Any given civil action can have numerous phases. While the parties' postures on individual matters may be more or less justified, the EAJA -- like other fee shifting statutes -- favors treating a case as an inclusive whole, rather than as atomized line-items.

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[4]That Koleos had repeated telephone calls in which Cummings changed his position also cut against the military prosecutor's false testimony that Koleos could not locate Cummings.

496 U.S. at 161-63.

Many Circuits which have addressed this issue have determined that a substantial justification analysis must be based on the "totality of the circumstances" surrounding the proceedings in question. See, Estate of Merchant v. Commissioner, 947 F.2d 1390, 1393 (9th Cir. 1991); Sampson v. Chater, 103 F.3d 918 (9th Cir. 1996); United States v. 341.45 Acres of Land, St. Louis Cty., Minn., 751 F.2d 924, 940-41 (8th Cir. 1984) ("We must consider the totality of the circumstances -- prelitigation and during litigation -- in determining whether the position of the government was substantially justified." Id. at 940.); In re Lamson, 1995 U.S. App. LEXIS 2566 (4th Cir. 1995); and United States v. Charles Gyurman Land & Cattle Co., 836 F.2d 480 (10th Cir. 1987).

The Court of Appeals' decision here, as with the District Court's decision below, focused solely on a single decision of one individual who was largely uninvolved in the sweep of events that led to the termination of Morgan's illustrious career in the United State Marine Corps. Such a narrow focus clearly is not a "totality of the circumstances" analysis and thus places this decision at odds with the analysis of EAJA by other circuits.

CONCLUSION

The Court of Appeals' affirmance of the District Court's denial of fees to Petitioner under the Equal Access to Justice Act constitutes a gross error of federal law which, if left uncontradicted, will have a chilling effect on potential plaintiffs and the bar in direct contravention of the Congressional purpose in enacting EAJA.

The lower courts' focus on the single decision of Colonel Lynch, rather than deciding this case on the totality of the circumstance, and particularly on the basis of the unconstitutional conduct of the military prosecutor, Captain Koleos, conflicts with the method of analysis applied not only in other Circuit Courts of Appeal, but with earlier decisional law of the Third Circuit.

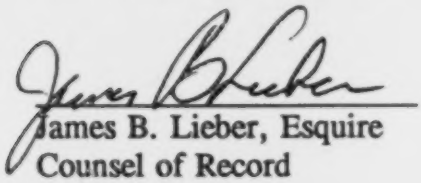
The appropriate scope of analysis to be applied in EAJA cases has not been clearly stated by this Court. The instant petition provides this Court with an opportunity to answer such questions and to provide guidance in future cases.

Finally, Petitioner seeks a remedy to the lower courts' fundamental error wherein it focused on the singular decision of Colonel Lynch to deny retraction of the OTH, rather than on the unconstitutional conduct of military prosecutor Koleos, upon which all of Petitioner Morgan's relief was granted. As previously stated, the lower courts' focus on General Lynch's decision was, in essence, the creation of a governmental "straw man" to take responsibility for all of the preceding unconstitutional conduct. Such analysis insulated the government from being made to accept responsibility for its conduct, and placed the full financial burden of successfully litigating this action on Petitioner Morgan.

If not reversed, the decision of the Third Circuit will water the EAJA and hinder access to courts even for plaintiffs with meritorious constitutional claims.

Respectfully submitted,

LIEBER & HAMMER, P.C.



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(2)

Supreme Court, U.S.
FILED

98 749 SEP 21 1998

No. _____ OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1998

TERRENCE D. MORGAN,

Petitioner,

vs.

SECRETARY OF DEFENSE,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 96-3314
TERENCE D. MORGAN,

Appellant

v.

WILLIAM PERRY, in his capacity as Secretary of Defense; JOHN DALTON, in his capacity as Secretary of the Navy; GENERAL C. E. MUNDY in his capacity as Commandant of the Marine Corps; BRIGADIER GENERAL J.W. CLIMP, in his capacity as Commanding General, Marine Corps Recruit Depot, Eastern Recruiting Region, Parris Island.

SUR PETITION FOR REHEARING

(Filed June 23, 1998)

Present: BECKER, *CHIEF JUDGE*,
SLOVITER, STAPLETON, GREENBERG,
SCIRICA, COWEN, NYGAARD, ALITO,
ROTH, McKEE and RENDELL
Circuit Judges,

The petition for rehearing filed by appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the

petition for rehearing is denied. Chief Judge Becker would have granted rehearing.

BY THE COURT,

/s/ Theodore A. McKee
Circuit Judge
Hon. Theodore A. McKee

DATED: JUN 23 1998

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 96-3314
TERENCE D. MORGAN,

Appellant

v.

WILLIAM PERRY, in his capacity as Secretary of Defense; JOHN DALTON, in his capacity as Secretary of the Navy; GENERAL C. E. MUNDY in his capacity as Commandant of the Marine Corps; BRIGADIER GENERAL J.W. CLIMP, in his capacity as Commanding General, Marine Corps Recruit Depot, Eastern Recruiting Region, Parris Island.

On Appeal from the United States District Court
for the Western District of Pennsylvania

(Civil No. 91-1064)
(Filed July 1, 1998)

Before MANSMANN and McKEE, *Circuit Judges*,
and VANARTSDALEN, *Senior District Judge**

RECEIVED AND FILED

7-1-98 CCC
P. DOUGLAS SISK, CLERK

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* The Honorable Donald W. VanArtsdalen, United States District Court Judge for the Eastern District of Pennsylvania, sitting by designation.

JUDGMENT

This cause came on to be heard on the record from the United Stales District Court for the Western District of Pennsylvania and was argued by counsel on April 30, 1997.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered on May 7, 1996, be, and the same is hereby affirmed. All of the above in accordance with the opinion of this Court.

ATTEST:

/s/ P. Douglas Sisk
Clerk

Dated: April 27, 1998

Certified as a true copy and issued in lieu of a formal mandate on July 1, 1998.

Teste: /s/ P. Douglas Sisk

Clerk, U.S. Court of Appeals
For the Third Circuit.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 96-3314
TERENCE D. MORGAN,

Appellant

v.

WILLIAM PERRY, in his capacity as Secretary of Defense; JOHN DALTON, in his capacity as Secretary of the Navy; GENERAL C. E. MUNDY in his capacity as Commandant of the Marine Corps; BRIGADIER GENERAL J.W. CLIMP, in his capacity as Commanding General, Marine Corps Recruit Depot, Eastern Recruiting Region, Parris Island.

On Appeal from the United States District Court
for the Western District of Pennsylvania

(Civil No. 91-1064)
(Filed April 27, 1998)

Before MANSMANN and McKEE, *Circuit Judges*,
and VANARTSDALEN, *Senior District Judge**

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Western District

---

* The Honorable Donald W. VanArtsdalen, United States District Court Judge for the Eastern District of Pennsylvania, sitting by designation.

of Pennsylvania and was argued by counsel on April 30, 1997.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered on May 7, 1996, be, and the same is hereby affirmed. All of the above in accordance with the opinion of this Court.

ATTEST:

/s/ P. Douglas Sisk
Clerk

Dated: April 27, 1998

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

TERENCE D. MORGAN, Plaintiff, vs. WILLIAM PERRY, in his capacity as Secretary of Defense, JOHN DALTON, in his capacity as Secretary of the Navy; GENERAL C.E. MUNDY, in his capacity as Commandant of the Marine Corps, BRIGADIER GENERAL J.W. CLIMP, in his capacity as Commanding General, Marine Corps Recruit Depot, Eastern Recruiting Region, Parris Island, Defendants.	)	Civil Action No. 91-1064

MEMORANDUM

I

In this civil action, plaintiff, Terence D. Morgan, a former Master Sergeant and Recruiting Instructor in the United States Marine Corps, sought declaratory and injunctive relief to redress alleged violations of his constitutional rights by defendants. Plaintiff's complaint arose out of his "other than honorable" (OTH) discharge from the Marine Corps in August, 1989 after investigations into recruiting fraud in Recruiting Station (RS) Pittsburgh.

After a lengthy non-jury trial, the court determined that plaintiff's right to due process of law under the Fifth Amendment to the United States Constitution had been violated as a result of the military prosecutor's misconduct during the week preceding plaintiff's scheduled trial by general court-martial for violations of the Uniform Code of Military Justice. Based on this determination, the court awarded limited declaratory and equitable relief to plaintiff.

Presently, before the court is plaintiff's application for an award of attorney's fees and costs (the fee petition), which was filed under the Equal Access to Justice Act (EAJA), 28 U.S.C. 2412(d). For the reasons set forth below, the fee petition will be denied.

II

The factual allegations of plaintiff's complaint are too lengthy to summarize.[1] However, the essence of the complaint is a wide-ranging conspiracy among various officers of the United States Marine Corps "to ruin [plaintiff's] reputation, to deprive him of his constitutional rights, and to force him to leave the Marine Corps in undeserved disgrace." (Complaint, p. 5).

Plaintiff asserted six claims against defendants, alleging the violation of his rights under the First, Fifth, Sixth,

---

[1] The allegations of plaintiff's 53-page complaint are set forth in 119 paragraphs. In addition, there are 25 exhibits attached to plaintiff's complaint.

Eighth and Fourteenth Amendments to the United States Constitution,[2] and he sought the following relief:

* * *

PRAYER FOR RELIEF

119. As a result of the above conduct by Defendants, Plaintiff has been damaged by deprivation of his Constitutional rights, by harm to his reputation, by being unjustly discharged from the Marine Corps with loss of pay and benefits, by harm to his chances for employment at a level commensurate with abilities, and by prolonged and continuing emotional distress.

WHEREFORE, Plaintiff requests declaratory and injunctive relief as follows:

a. That the Court declare that Plaintiff's Constitutional rights of due process, free speech, equal protection, right to counsel, right to be protected against the infliction of cruel and unusual punishment, and privileges and immunities of American citizenship have been violated by Defendants;

b. That the Court issue a permanent injunction providing for his reinstatement in the Marine Corps, with restitution of all financial losses and losses of benefits suffered as a result of Defendants' conduct, and with expungement of his "discharge under other than honorable conditions."

---

[2] Plaintiff did not pursue his Eighth Amendment or Fourteenth Amendment claims at trial.

c. An award of costs, disbursements and reasonable attorney fees; and

d. Such other and further relief as the Court deems just and equitable.

(Complaint, pp. 52-53).

III

The EAJA provides in relevant part:

§ 2412. Costs and fees

* * *

(d)(1)(A) Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

* * *

28 U.S.C. § 2412(d)(1)(A).

Defendants do not oppose the fee petition on the ground that plaintiff is not a prevailing party under the EAJA. Rather, defendants claim that the position of the United States was substantially justified and that special circumstances make an award unjust.

With respect to the issue of substantial justification, in *Hanover Potato Products, Inc. v. Shalala*, 989 F.2d 123 (3d Cir.1993), the United States Court of Appeals for the Third Circuit stated in relevant part:

* * *

III. SUBSTANTIAL JUSTIFICATION

A. Definition

The EAJA, 28 U.S.C. § 2412(d)(1)(A), provides, in pertinent part, that a court shall award attorney's fees to a prevailing party in litigation against the United States that judicially reviews U.S. agency action, unless the court finds that the "position of the United States" was "substantially justified." The issue in this case is whether the district court abused its discretion by finding the FDA substantially justified in taking these actions and positions.

Substantial justification under the EAJA has been defined by the Supreme Court as "justified in substance or in the main – that is, justified to a degree that could satisfy a reasonable person." *Pierce*, 487 U.S. at 565, 108 S.Ct. at 2550. Alternatively phrased, an agency position is substantially justified if it has a reasonable basis in both law and fact. *See id.*

The burden of demonstrating substantial justification for its position rests squarely on the government agency. *Dougherty v. Lehman*, 711 F.2d 555, 561 (3d Cir. 1983). Before *Pierce* was decided, we held that for the government to meet its burden, it must show:

> 1. a solid and well-founded basis in truth for the facts alleged; 2. a solid and well-founded basis in law for the theory it propounded; and 3. a solid and well-founded connection between the facts alleged and the legal theory advanced.

Taylor v. Heckler, 835 F.2d 1037, 1042 (3d Cir.1987) (quoting *Garcia v. Schweiker*, 829 F.2d 396, 399 (3d Cir.1987). (footnote omitted). *Pierce*, of course, adopted a reasonableness standard for substantial justification. Accordingly, we will no longer require a "solid and well-founded" basis, but rather a reasonable basis only. Nevertheless, the basic framework enunciated by *Garcia*, as modified by *Pierce*, is still the correct statement of the law of substantial justification.

Moreover, under 28 U.S.C. § 2412(d)(2)(D), "the position of the United States" includes not only the position taken in the litigation, but the agency position that made the litigation necessary in the first place. *Taylor*, 835 F.2d at 1040 (quoting *Lee v. Johnson*, 801 F.2d 115, 116 (Becker, J., dissenting sur denial of petition for rehearing)). Thus unless both the agency's litigation and pre-litigation positions meet the modified three-part criteria of *Taylor*, the government's position is not substantially justified. *Taylor*, 835 F.2d at 1042.

* * *

989 F.2d at 128.

Applying the reasonableness standard in the present case, the court concludes that defendants' pre-litigation and litigation positions were substantially justified.[3]

IV

A

Initially, the court notes that its jurisdiction to hear plaintiff's claims in this case was far from clear and presented a close question of law.[4] Although the court ultimately concluded that it did have jurisdiction based on the decision of the United States Court of Appeals for the Third Circuit in *Jaffee v. United States*, 592 F.2d 712 (3d Cir.1979), in which it was held that Section 702 of the Administrative Procedure Act (APA), 5 U.S.C. §§ 701 *et seq.*, waives sovereign immunity in nonstatutory review of agency action under 28 U.S.C. § 1331, the court agrees with defendants that plaintiff exacerbated the jurisdictional controversy by failing to allege the appropriate waiver of sovereign immunity under the APA in his complaint or in any subsequent filings with the court.

---

[3] Based on this conclusion, the court will not address defendants, alternative argument that special circumstances make an award of fees unjust.

[4] In his reply brief, plaintiff states: "During litigation, the government repeatedly attacked the Court's jurisdiction, a position clearly not supported by the law." (Reply Brief, p. 6). Contrary to this statement, it is the court's belief that the jurisdictional issue presented a substantial question of law, and that government counsel would have been remiss in not strenuously pursuing its argument that this court lacked jurisdiction to hear plaintiff's claims.

(Response in opposition, p. 5 fn 4). In fact, plaintiff disregarded the court's specific instruction to file an amended complaint alleging the appropriate waiver of sovereign immunity under the APA.

B

With respect to plaintiff's First Amendment claim, plaintiff alleged that he was retaliated against for "whistleblowing" activities. Specifically, plaintiff alleged that defendants retaliated against him for reporting problems in RS Pittsburgh to his superior officers, and for communicating with members of the United States Congress about the misconduct engaged in by members of the investigating team during the investigation into recruiting fraud in RS Pittsburgh. However, plaintiff's evidence totally failed to substantiate these claims.

As to the investigation of RS Pittsburgh ordered by General Jarvis D. Lynch, Jr. in December, 1988, defendants' evidence established that this investigation was based entirely on a detailed briefing on recruiting ordered by General Lynch when he became the Commanding General of the Marine Corps Recruit Depot (MCRD) in Parris Island, South Carolina in early October, 1988. The court found entirely credible the testimony of General Lynch that he did not know plaintiff; that he was never informed that plaintiff had complained to an officer of the 4th Marine Corps District about problems in RS Pittsburgh; and that the investigation he ordered was not based on any "whistleblowing" activity by plaintiff.

As to the investigation of recruiting fraud in RS Pittsburgh led by Lieutenant Colonel John Spencer Evans,

Jr. in January, 1989, defendants' evidence clearly established that this investigation resulted from allegations made by a recruit named George Sens, who reported to the MCRD in Parris Island, South Carolina for basic training from RS Pittsburgh with a bleeding ulcer, a medical condition that should have precluded his enlistment into the Marine Corps.

Finally, as to plaintiff's communications with members of the United States Congress concerning misconduct engaged in by members of the investigating team during the investigation into recruiting fraud in RS Pittsburgh, there was absolutely no evidence that General Lynch, or any other Marine Corps officer who was involved in the events leading to plaintiff's OTH discharge, had knowledge of plaintiff's communication with the late Senator John Heinz or took any retaliatory action against plaintiff as a result of this communication. With respect to plaintiff's letter to Congressman John Murtha, this letter was sent after plaintiff's OTH discharge from the Marine Corps. Therefore, it could not have been the basis for any retaliatory action against plaintiff.

Simply put, there was no basis for concluding that plaintiff was a "whistleblower who was retaliated against for such activities, which was his major contention in this litigation. As a result, the court found in favor of defendants on plaintiff's First Amendment claim.

C

In connection with plaintiff's Sixth Amendment claim, plaintiff asserted that his right to counsel was violated during the January, 1989 investigation into

recruiting fraud in RS Pittsburgh, when Captain John E. Evans, a member of the investigating team, misled plaintiff into believing that he was acting as plaintiff's legal counsel Although plaintiff offered evidence at trial to support his allegation that Captain Evans misrepresented himself to be an attorney with whom plaintiff and other recruiters could consult during the January, 1989 investigation, the court concluded that plaintiff failed to establish that he sustained any harm as a result of such misrepresentation.

Plaintiff's consultation with Captain Evans during the January, 1989 investigation of RS Pittsburgh did not result in any incriminating statements. Moreover, prior to the initiation of charges against plaintiff in March, 1989, Captain Louis J. Puleo, a defense attorney at the MCRD in Parris Island, South Carolina, undertook plaintiff's representation at no charge, and he continued to provide representation to plaintiff through August, 1989, when plaintiff was discharged from the Marine corps. Under the circumstances, the court found against plaintiff on his Sixth Amendment claim.

D

Turning to plaintiff's equal protection claim under the Fifth Amendment, this claim related to the charge against plaintiff for gambling. Plaintiff maintained that gambling was tolerated in the Marine Corps, and that he was selectively prosecuted for this offense, or treated differently from other Marines who engaged in gambling activities, because he asserted his constitutional rights, including his right to free speech and his right to counsel.

Anecdotal evidence was presented at trial to establish that gambling took place in RS Pittsburgh in the form of football pools, raffle tickets and the Pennsylvania lottery, and that no one was ever prosecuted for engaging in such gambling activities. However, plaintiff's arguments in connection with his equal protection claim failed to recognize that he was not being prosecuted for these types of gambling activities. Rather, defendants' evidence established that plaintiff was being prosecuted for alleged bookmaking activities. Plaintiff presented no evidence to establish that other Marines engaged in "bookmaking" activities and that the Marine Corps chose not to prosecute them. As a result, the court concluded that plaintiff's equal protection claim was meritless because he failed to establish that he was treated differently than similarly situated Marines.

E

Finally, as to plaintiff's due process claim under the Fifth Amendment, the court concluded that plaintiff's evidence established that the conduct of the military prosecutor, captain D.J. Koleos, during the week preceding plaintiff's scheduled trial by general court-martial violated plaintiff's right to procedural due process. Specifically, the court found that Captain Koleos engaged in deceptive conduct in connection with the availability of Staff Sergeant Cummings, a recruiter from RS Pittsburgh who was scheduled to testify against plaintiff, and in connection with the ability of the government to gain possession through Staff Sergeant Cummings of the "gray book," which was alleged to contain a record of plaintiff's

"bookmaking" activities.[5] The court further found that Captain Koleos' deception was a decisive factor in plaintiff's decision to request an OTH discharge in lieu of trial by general court martial, violating plaintiff's right to an opportunity to be heard on the charges against him.[6]

---

[5] Although plaintiff claimed that he never kept a gray book, or any other gambling record, the evidence at trial, at least circumstantially, led to the opposite conclusion. It was clear to the court that plaintiff's belief that the gray book would be offered as evidence in his trial by general court-martial induced him to submit his request for an OTH discharge. If the gray book was a forgery, plaintiff, with counsel's assistance, could easily have discredited it. The fact that plaintiff submitted his request for an OTH discharge, presumably with the advice of his counsel, after being misled into believing that the gray book would be offered at trial, suggests that plaintiff knew that a genuine gray book existed. Further, Captain Puleo, plaintiff's Marine corps defense attorney, testified at the trial of this action, and he asserted the attorney-client privilege on cross examination when asked whether plaintiff had disclosed the existence of the gray book to him.

[6] With respect to plaintiff's claims that his right to due process under the Fifth Amendment was violated by Captain Koleos' misconduct in connection with a report of a telephone interview of Jerry Williams on March 16, 1989, which resulted in the initiation of charges against plaintiff for making false diplomas for recruits, and by the misconduct of certain members of the investigation team led by Lieutenant Colonel Evans in January, 1989, the court was unpersuaded that these incidents of misconduct were factors in plaintiff's decision to request an OTH discharge in lieu of trial by general court-martial. Therefore, the court declined to find that such misconduct also violated plaintiff's Fifth Amendment right to due process.

Based an this violation of plaintiff's right to due process of law under the Fifth Amendment, and recognizing that it would be impossible, after more than six years, for the parties to pursue the court-martial charges that had been dismissed after the acceptance of plaintiff's OTH discharge, the court entered an order declaring that defendants had violated plaintiff's right to due process and directing defendants to expunge the portion of plaintiff's military records which reflected a reduction in rank and an OTH discharge; to reinstate plaintiff into the United States Marine Corps at the rank of Master Sergeant through February 5, 1990;[7] to restore to plaintiff all rights, honors and privileges of his status as a Master Sergeant; and to recharacterize plaintiff's discharge as honorable or general using the standards applicable to those discharged at the expiration of their normal terms of service. Contrary to plaintiff's characterization of the relief obtained through this litigation (Reply Brief, p. 1), the relief awarded to plaintiff was very limited in relation to the requested relief.

---

[7] Plaintiff's last reenlistment into the United States Marine Corps occurred on February 6, 1987 and it was for a period of three years. Therefore, plaintiff's reenlistment period would have expired on February 5, 1990. It is undisputed that there is no vested property right in future reenlistment in the Marine Corps, and, based on the circumstances surrounding the investigation into recruiting fraud in RS Pittsburgh, the court concluded that plaintiff would not have been permitted to reenlist upon the expiration of his last reenlistment period on February 5, 1990.

F

In conclusion, defendants' pre-litigation and litigation positions were substantially justified. As to defendants' position at the administrative level, when plaintiff attempted to withdraw his request for an OTH discharge, Colonel G.W. Jones, Staff Judge Advocate to General Lynch, interviewed both Captain Koleos and Captain Puleo concerning the circumstances surrounding plaintiff's request for such a discharge in lieu of trial by general court-martial. After interviewing both counsel, Colonel Jones prepared a memo for General Lynch, recommending that plaintiff's request be denied. In the memo, Colonel Jones indicates that whether the representations of Captain Koleos were the causative factor in plaintiff's submission of his request for an administrative discharge was speculative at best; that it should be noted that plaintiff did not indicate in his request for separation that he considered the gray book to be the dispositive evidentiary factor in his decision to avoid trial by court-martial; and that the government was not relying upon the production of the gray book to obtain a conviction because it also had the testimony of six witnesses and other corroborative documentary evidence concerning the gambling charge.[8] (Exhibit E) Clearly, General

---

[8] It should also be noted that, under military law, a person accused of an offense must be tried within 120 days of the date the charges are filed. In plaintiff's case, the last day of his "speedy trial" time was August 8, 1989, the date of his scheduled trial by general court-martial. Although Captain Puleo testified that he expected plaintiff's August 8th request to withdraw his OTH discharge to be treated as defense delay, which would have tolled the "speedy trial" clock, there is no

Lynch's decision to accept Colonel Jones' recommendation had a reasonable basis in both law and fact.

Turning to defendants' litigation position, the court agrees with defendants that the determination that Captain Koleos, the military prosecutor, violated Plaintiff's right to due process under the Fifth Amendment was based on a credibility determination. (Response in Opposition, p. 9). After hearing the testimony of Captain Koleos and the testimony of Captain Puleo, the court simply found Captain Puleo to be more credible. This determination does not compel a finding that General Lynch lacked a reasonable basis in both law and fact for his decision to accept Colonel Jones, recommendation and deny plaintiff's request to withdraw his request for an OTH discharge. Under the circumstances, plaintiff's fee petition will be denied.

An order follows.

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indication in the request that plaintiff was willing to waive his "speedy trial" rights, and the filing of the request itself would not have stopped the "speedy trial" clock. By August 9, 1989, plaintiff's "speedy trial" time would have expired. *See* Opinion at p. 50 fn 54 (8/24/95).

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

TERENCE D. MORGAN, Plaintiff, vs. WILLIAM PERRY, in his capacity as Secretary of Defense, JOHN DALTON, in his capacity as Secretary of the Navy; GENERAL C.E. MUNDY, in his capacity as Commandant of the Marine Corps, BRIGADIER GENERAL J.W. CLIMP, in his capacity as Commanding General, Marine Corps Recruit Depot, Eastern Recruiting Region, Parris Island, Defendants.	)	Civil Action No. 91-1064

ORDER

AND NOW, this 3rd day of May, 1996, in accordance with the foregoing memorandum, it is ORDERED that the application of plaintiff, Terence D. Morgan, for an award of attorney's fees and costs under the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412(d), be, and hereby is, denied.

/s/ William L. Standish
William L. Standish
United States District
Judge

cc: James B. Lieber, Esq.
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APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

TERENCE D. MORGAN, Plaintiff, vs. WILLIAM PERRY, in his capacity as Secretary of Defense, JOHN DALTON, in his capacity as Secretary of the Navy; GENERAL C.E. MUNDY, in his capacity as Commandant of the Marine Corps, BRIGADIER GENERAL J.W. CLIMP, in his capacity as Commanding General, Marine Corps Recruit Depot, Eastern Recruiting Region, Parris Island, Defendants.	)	Civil Action No. 91-1064

OPINION

In this civil action, plaintiff, Terence D. Morgan, seeks declaratory and equitable relief against defendants, William Perry, John Dalton, General C.E. Mundy and Brigadier General J.W. Climp, for the alleged violation of his constitutional rights. After a non-jury trial, the court makes the following findings of fact and conclusions of law pursuant to Fed.R.Civ.P. 52(a). For the reasons stated therein, the court concludes that plaintiff is entitled to a declaration that defendants violated his right to due process of law under the Fifth Amendment to the United

States Constitution. Based on this determination, defendants will be directed to expunge the portion of plaintiff's military records which reflect a reduction in rank and an OTH discharge; to reinstate plaintiff into the United States Marine Corps at the rank of Master Sergeant through February 5, 1990; to restore to plaintiff all rights, honors and privileges of his status as a Master Sergeant in the United States Marine Corps; and to recharacterize plaintiff's discharge as honorable or general using the standards applicable to those discharged at the expiration of their normal terms of service.

Findings of Fact

1. Plaintiff, Terence D. Morgan, joined the United States Marine Corps in September, 1973 through the "Delayed Entry Program," which permits high school seniors to sign enlistment contracts prior to their graduation. Plaintiff reported to the Marine Corps Recruit Depot (MCRD) in Parris Island, South Carolina for basic training on June 23, 1974, three weeks after his high school graduation. Plaintiff's last reenlistment in the United States Marine Corps, which was for a period of three years, occurred on February 6, 1987. (Exhibit O). Therefore, plaintiff's reenlistment period would have expired on February 5, 1990.

2. After basic training, plaintiff received a meritorious promotion to the rank of Exchange officer, and he remained at the MCRD in Parris Island, South Carolina. Thereafter, he served as Club Manager for the Exchanges at Camp Garcia and Camp LeJeune. In 1979, plaintiff was ordered to recruiting duty, and he attended recruiting

school in April, 1980. In June, 1980, he was ordered to the Greensburg substation of Recruiting Station (RS) Pittsburgh, and he moved to Irwin, Pennsylvania.[1]

3. RS Pittsburgh is part of the 4th Marine Corps District, which is headquartered in Philadelphia, Pennsylvania. In turn, the 4th Marine Corps District is part of the Eastern Recruiting Region, which is headquartered at the MCRD in Parris Island, South Carolina. On October 5, 1988, Major General Jarvis D. Lynch, Jr. became the Commanding General of the Eastern Recruiting Region and the MCRD in Parris Island, South Carolina. At that time, Colonel David A. Jones was the Director of the 4th Marine Corps District, which encompasses nine recruiting stations in seven states. At trial, Colonel Jones described his "mission" as Director of the 4th Marine Corps District as the recruitment of mentally and morally qualified men and women into the United States Marine Corps.

4. A recruiting station is operated by a Command Group, which includes a Commanding Officer, an Executive Officer, an operations Officer, a Sergeant Major, a Recruiting Instructor and an Assistant Recruiting Instructor. (Exhibit H). At the time of the events in question, the following individuals comprised the Command Group of

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[1] A recruiting station is organized around recruiting substations, which are recruiting facilities manned by one or more recruiters on a full-time basis. A recruiting substation is under the direct operational and administrative control of the recruiting station and is supervised by a Non-Commissioned officer in Charge (NCOIC). (Exhibit H). RS Pittsburgh is comprised of recruiting substations located throughout Western Pennsylvania and parts of Ohio and West Virginia.

RS Pittsburgh: Major George Eberhart, Jr., Commanding Officer; Captain James C. Kaufman, Executive Officer; First Lieutenant T.M. Brown, Operations Officer; Sergeant Major Thaddeus L. Rozek, Sergeant Major; plaintiff, Master Sergeant Terence D. Morgan, Recruiting Instructor; and Gunnery Sergeant John J. Lemro, Assistant Recruiting Instructor. The main concern of the Command Group is to ensure that the recruiting station makes its "mission," which means to procure a specified number of new enlistment contracts with men and women eligible and willing to enlist in the United States Marine Corps and to ship a specified number of new recruits for basic training.[2] The members of the Command Group do not have to meet individual monthly enlistment and shipping quotas. However, they are responsible individually and as a group for the recruiting station achieving its mission. The central office of the Command Group of RS Pittsburgh is located in the Federal Building in the City of Pittsburgh.

5. To enlist in the Marine Corps, an applicant is normally required to have a high school diploma.[3] A GED is not acceptable. Applicants to the Marine Corps are also required to meet certain physical and moral standards. Under Marine Corps regulations, recruiters are permitted

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[2] The monthly enlistment and shipping quotas are divided by the Marine Corps districts among their recruiting stations. In turn, the recruiting stations divide the enlistment and shipping quotas among their individual recruiters. At trial, recruiting was described as a "numbers" game, and the individual recruiters are rated by their "numbers."

[3] Apparently, there are some exceptions to this rule. However, the testimony at trial was unclear as to the exceptions.

to enlist into the Delayed Entry Program (DEP) those individuals who are eligible and willing to ship to basic training within 365 days of signing the enlistment contract. These individuals are known as "poolees," and they sign a contract evidencing their intent to become subject to the Uniform Code of Military Justice (UCMJ). Poolees are placed in the "DEP pool," which is the collection of potential recruits to be enlisted in the Marine Corps and shipped for basic training. High school seniors who anticipate graduating within one year are permitted to sign enlistment contracts and enter the DEP pool. Also, individuals with temporary medical conditions that preclude immediate shipping for basic training, and individuals with other non-permanent disqualifications, are allowed to sign enlistment contracts and enter the DEP pool. A large DEP pool enhances a recruiting station's ability to meet its monthly shipping mission. A "dirty pool" is the term used to describe a DEP pool containing poolees who are not qualified to join the Marine Corps for some reason, such as the lack of a high school diploma or a disqualifying medical condition.

6. A recruit package is prepared for each poolee by his or her recruiter, and the package includes, *inter alia*, a high school diploma, Social Security card, birth certificate and medical form. Recruit packages are the direct responsibility of the individual recruiter, the NCOIC of the recruiting substation, the Commanding officer, the Operations Officer and the "MEPS" liaison. These are the individuals who have the duty of verifying the legitimacy of the documents in recruit packages. "MEPS" is the abbreviation for the Military Entrance Processing System, which is a service shared by all branches of the military

that recruit applicants. It conducts medical exams, administers tests and otherwise processes applicants. The MEPS liaison is the quality control person for the Commanding Officer of a recruiting station, and the position requires integrity, courage and a willingness to go to the Commanding officer to report problems. The MEPS liaison may also bring problems to the attention of the Recruiting Instructor to assure further recruiter training. The MEPS liaison is not a member of the Command Group, and he is not under any pressure to make "mission." Rather, the MEPS liaison is a proof source whose prime concern is to ensure adherence to military regulations. In RS Pittsburgh, the MEPS office is located in the Federal Building in the City of Pittsburgh.

7. After his first year of recruiting duty, plaintiff was named "Rookie Recruiter of the Year." In 1983, he was promoted to the rank of NCOIC of the Greensburg substation of RS Pittsburgh, and, in 1984, he was named "Non-Commissioned officer (NCO) of the Year." In late 1985, plaintiff was promoted to the rank of Assistant Recruiting Instructor for RS Pittsburgh. At that time, Master Sergeant Eugene Zuro was the Recruiting Instructor of RS Pittsburgh. In January, 1986, plaintiff replaced Master Sergeant Zuro as the Recruiting Instructor, and, in late 1986, Master Sergeant John J. Lemro became the Assistant Recruiting Instructor of RS Pittsburgh.

8. In connection with plaintiff's promotion to the rank of Recruiting Instructor, the Recruiting Instructor is

the senior most professional recruiter in a recruiting station.[4] He travels throughout the recruiting station to train recruiters in sales techniques and the completion of paperwork. The Recruiting Instructor also provides assistance to recruiters who are having trouble making "mission," and he will do whatever it takes to provide such assistance. The Recruiting Instructor has no duty to verify documents in recruit packages.

9. In 1984 and 1985, while Major J.P. Walsh was the Commanding Officer of RS Pittsburgh, RS Pittsburgh ranked first in the nation in recruiting. In 1986, Major George A. Eberhart, Jr. became the Commanding Officer of RS Pittsburgh. Major Eberhart's determination to continue RS Pittsburgh's success resulted in tremendous pressure being placed on the recruiters to make "mission."

10. In September, 1988, plaintiff observed a significant increase in the number of pending discharges from the DEP pool. In addition, plaintiff discovered that numerous documents were missing from recruit packages, and RS Pittsburgh was experiencing difficulty making "mission." As a result, in mid-September, 1988, plaintiff met with Major Eberhart to inform him that the MEPS liaison, Gunnery Sergeant Michael Z. Brown, was

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[4] According to the United States Marine Corps Guidebook for RS Operations, the Recruiting Instructor must be a hand picked career recruiter. (The Military Occupational Specialty of Career Recruiter is designated as an 8412). He does not have to be the senior staff NCO within the recruiting station; however, he must have the background, personality, initiative and motivation to effectively teach and assist other recruiters. (Exhibit H).

allowing people to enlist in the Marine Corps who did not have the proper documents in their recruit packages.[5] In response, Major Eberhart stated that he would discuss the matter with Gunnery Sergeant Brown.[6]

11. RS Pittsburgh barely made its "mission" in September, 1988. By October 1, 1988, RS Pittsburgh was in serious trouble and the recruiting station went to "direct ship" mode. "Direct ship" mode means that qualified recruits are enlisted and shipped to the MCRD in Parris Island, South Carolina for basic training within 30 days.[7]

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[5] On May 15, 1986, Gunnery Sergeant Michael Z. Brown was assigned the position of MEPS liaison NCO for RS Pittsburgh. His duties were set forth in a memo from Major Walsh, the Commanding Officer of RS Pittsburgh at that time, and the duties included the verification of education, birth and moral status of all applicants. (Exhibit 27).

[6] At this time, plaintiff also questioned Major Eberhart's policy of allowing high school juniors to sign enlistment contracts and be placed into the DEP pool. Plaintiff did not believe that this practice was a good policy because it increased the likelihood that these poolees would not qualify for enlistment within 365 days, resulting in further discharges from the DEP pool. Major Eberhart responded that he had heard that the Air Force allowed the enlistment of high school juniors.

[7] The testimony at trial established that it is difficult, if not impossible, for a recruiting station to make its monthly mission in "direct ship" mode. Moreover, "direct ship" mode is undesirable because "direct shippers" are not prepared for boot camp. Master Sergeant Lemro, the Assistant Recruiting Instructor of RS Pittsburgh at the relevant time, testified that these recruits are "shell shocked" by boot camp. He explained that it is much more desirable to work with high school seniors who have at least 6 months until graduation. In this situation, the recruits become acquainted with their recruiters and learn more about the Marine Corps before they are shipped for basic training.

Plaintiff discovered that 350 documents were missing from recruit packages, including high school diploma verifications.[8] Since applicants were required to have high school diplomas, the Marine Corps had strict regulations regarding education verification. Recruiters were required to go to an applicant's high school, in person, to obtain a counselor's signature or to obtain a school seal on a copy of the applicant's transcript or diploma before an applicant was processed for shipping to the MCRD in Parris Island, South Carolina. Due to the large number of missing documents from recruit packages, plaintiff asked Major Eberhart for a MEPS inspection by plaintiff and others designated by the Commanding officer. However, Major Eberhart refused plaintiff's request, stating that he would "take care of Gunnery Sergeant Brown."

12. Despite Major Eberhart's response that he would take care of the problem with the MEPS liaison, plaintiff called Master Sergeant Zuro, the former Recruiting Instructor of RS Pittsburgh and a member of the Contact Team for the 4th Marine Corps District.[9] Plaintiff

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[8] With respect to missing documents, Colonel Siebrand H. Niewenhous, III, Executive officer for the 4th Marine Corps District, testified that all recruiting stations have missing documents, and that it is just a part of the process. A log of missing documents is kept, and it is the responsibility of the Operations officer of the recruiting station to stay on top of it. Ultimately, the Commanding Officer is responsible for missing documents. Colonel Niewenhous further testified that 300 to 400 missing documents would be unusual, unless the size of the DEP pool was very large. It is also very important to consider the type of documents that are missing.

[9] The Contact Team consists of 3 NCOs and 1 CO, who are experts in the field of recruiting. The Contact Team provides

informed Master Sergeant Zuro that RS Pittsburgh was forced to go to "direct ship" mode; that there were numerous documents missing from recruit packages; that Major Eberhart was submitting false information to the 4th Marine Corps District concerning the number of DEP pool discharges and the need for direct ship applicants;[10] that Major Eberhart would not listen to him and that he was having serious arguments with Major Eberhart. In response, Master Sergeant Zuro stated that he would visit RS Pittsburgh at the end of October, 1988.[11]

13. On October 15, 1988, plaintiff attended a Marine Corps conference of NCOICs in Philadelphia, Pennsylvania. He drove to this conference with Staff Sergeant William R. Cummings, who was the NCOIC of the Greensburg substation of RS Pittsburgh at that time. While in Philadelphia, plaintiff went to dinner at Master Sergeant Zuro's house, and the problems in RS Pittsburgh were discussed. Master Sergeant Zuro told plaintiff to make the best of the situation because Major Eberhart's

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guidance to the recruiting stations and, pursuant to the Military Personnel and Procurement Manual, it is required to visit each recruiting station twice a year. One visit is called a "training and assist" visit. The other visit is an inspection of quality control, including the MEPS liaison.

[10] The 4th Marine Corps District compiles recruiting data through a system called the Automated Recruit Management System (ARMS). The data compiled by ARMS is derived from the daily reports submitted by the recruiting stations. If accurate information is submitted by the recruiting stations, uneven flows in shipping should be detected by ARMS.

[11] According to the testimony of Colonel Jones, Director of the 4th Marine Corps District, the Contact Team's visit to RS Pittsburgh in October, 1988 was a regularly scheduled visit.

make the best of the situation because Major Eberhart's service as the Commanding officer of RS Pittsburgh would end in 6 or 7 months.[12]

14. At the end of October, 1988, the Contact Team, consisting of Captain Hoffman, Master Sergeant Zuro and Master Sergeant Cawman, visited RS Pittsburgh. Plaintiff and the operations officer of RS Pittsburgh, First Lieutenant T.M. Brown, compiled a list of pending DEP pool discharges, missing documents and other problems, and plaintiff informed the Contact Team that Major Eberhart refused to discipline the MEPS liaison, Gunnery Sergeant Michael Z. Brown. Plaintiff also complained about Major Eberhart's use of threats to enhance recruiting by the recruiters and his practice of requiring the recruiters to be in their offices from 6:00 a.m. to 11:00 p.m.[13] Master Sergeant Zuro indicated that the Contact Team would not conduct an inspection of RS Pittsburgh during the visit, believing that it was more important to provide additional training.[14]

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[12] Apparently, a Commanding Officer of a recruiting station serves in that capacity for a term of three years.

[13] In this connection, the Assistant Recruiting Instructor, Master Sergeant Lemro, testified that the recruiters were averaging 14-hour work days. Due to the stress and the long hours, recruiters were getting ill and the situation was causing marital difficulties. Some recruiters wanted to quit recruiting.

[14] When the problems in RS Pittsburgh arose in the fall of 1988, plaintiff also contacted Master Sergeant Harry Turek, who had been the MEPS liaison of RS Pittsburgh from 1981 to 1983. Master Sergeant Turek met plaintiff when plaintiff was initially assigned to recruiting duty. At the time, Master Sergeant Turek was the NCOIC of the Greensburg substation of RS Pittsburgh. Master Sergeant Turek trained plaintiff, and he testified that

15. On November 1, 1988, Captain Hoffman prepared a memorandum for Colonel Jones, concerning the Contact Team's visit to RS Pittsburgh from October 25-28, 1988. (Exhibit 26). The memo discusses the DEP pool problems being experienced by RS Pittsburgh and describes the training that was provided by the Contact Team. A reorganization of the structure of the substations of RS Pittsburgh was "highly recommended to avoid further turmoil and maximize prospecting." In early November, 1988, Colonel Jones called Major Eberhart to discuss his concern about the number of discharges in the DEP pool. Major Eberhart acknowledged that he had to take some discharges, but he indicated that the DEP pool would be "cleaned up" in the next few months. Due to Colonel Jones' continued concern, he sent Colonel Niewenhous, Executive officer of the 4th Marine Corps District, to talk to Major Eberhart in person. Colonel Niewenhous arrived in RS Pittsburgh on January 4, 1989. Although Colonel Niewenhous did not want to put undue pressure on the Commanding Officer, he probed Major Eberhart for 1½ hours. Major Eberhart vehemently denied that there were problems in RS Pittsburgh. He

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plaintiff never did anything wrong or dishonest as a recruiter. Master Sergeant Turek became the MEPS liaison for RS Pittsburgh, and plaintiff testified that there had been no problems in RS Pittsburgh when Master Sergeant Turek was the MEPS liaison. Master Sergeant Turek was no longer assigned to RS Pittsburgh when plaintiff became the Recruiting Instructor. However, he talked to plaintiff several times a month by telephone. Plaintiff told Master Sergeant Turek about the problems in RS Pittsburgh, and Master Sergeant Turek advised plaintiff to contact someone at the District Command to protect himself.

admitted that making "mission" would be a challenge, but he indicated that it would be done.

16. When General Lynch became the Commanding General of the Eastern Recruiting Region and the MCRD in Parris Island, South Carolina in early October, 1988, he had no experience in recruiting. As a result, he ordered a briefing on the subject. General Lynch deemed the staff briefing on recruiting he received to be inadequate. Therefore, he directed the preparation of a detailed briefing in late October, 1988. He received the detailed briefing on the recruiting stations in the Eastern Recruiting Region in December, 1988. The briefing covered, *inter alia*, recruiter strengths, quotas, production and the size of the DEP pools in various districts. It was apparent to General Lynch from the detailed briefing that something was wrong in RS Pittsburgh, and he directed Colonel C.R. Casey, his Deputy Chief of Staff for Recruiting, to investigate and "fix it."[15] The investigation ordered by General Lynch was based entirely on the detailed briefing he had received from his staff in December, 1988. It was totally unrelated to the complaints made by plaintiff to Master Sergeant Zuro of the 4th Marine Corps District in October, 1988, concerning missing documents and the significant increase in the number of discharges from the DEP pool. In fact, General Lynch did not know plaintiff, and he was never informed that plaintiff had complained to Master Sergeant Zuro about problems in RS Pittsburgh.

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[15] General Lynch testified that Colonel Casey was the most experienced Marine with respect to recruiting.

17. In late December, 1988, George Sens (Sens), a new recruit from RS Pittsburgh, was shipped to the MCRD in Parris Island, South Carolina for basic training. After reporting to the MCRD, Sens admitted that he had a bleeding ulcer, a medical condition that should have precluded his enlistment in the Marine Corps. During the processing of his discharge in January, 1989, Sens alleged that he had informed his recruiter of his medical condition, and that he was told not to say anything about his medical condition to the doctors at the MEPS. Based on the allegations made by Sens, other recruits who had been shipped for basic training from RS Pittsburgh were interviewed. During these interviews, approximately 80 recruits made allegations of recruiting misconduct against their recruiters from RS Pittsburgh, which included allegations of recruiting fraud.

18. On Friday, January 27, 1989, Colonel Jones, the Director of the 4th Marine Corps District, received a telephone call from Colonel Casey, General Lynch's Deputy Chief of Staff for Recruiting, regarding the numerous allegations of recruiting misconduct by RS Pittsburgh's recruiters. Colonel Jones was instructed to send out a team to investigate, and, on Saturday, January 28, 1989, he assembled an investigating team of officers from the 4th Marine Corps District and the Eastern Recruiting Region. The Senior Investigating officer for this investigation was Lieutenant Colonel John Spencer Evans, Jr., Deputy Director of the 4th Marine Corps District.[16] Other

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[16] Because of the large number of recruiters involved and because of the need to expedite the investigation to minimize the impact on RS Pittsburgh, a team of officers and senior Staff

members of the investigating team included Major M.N. Derchak, Major D.J. Kappel, Captain John E. Evans, Captain E.S. Hoffman, Captain D.J. Koleos,[17] Master Sergeant W.L. Byrne, Master Sergeant D.A. Cawman, Master Sergeant M.J. Styka and Gunnery Sergeant R.R. Rivers. The Evans investigating team traveled to Pittsburgh on Sunday, and began its investigation on the morning of Monday, January 30, 1989.[18] Colonel Evans informed Major Eberhart of the reason for the investigation, and each recruiter in RS Pittsburgh was interviewed. Captain Evans read each individual his or her rights under Article 31 of the UCMJ, 10 U.S.C. § 831, which include the right to be informed of the nature of an accusation and the right to know that any statement made to the investigating team may be used as evidence in a trial by court-martial. Colonel Evans then asked each individual if he

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NCOs from the 4th Marine Corps District and the Eastern Recruiting Region was dispatched to assist Colonel Evans in the investigation. (Exhibit M, p. 4).

[17] Captain Koleos was the Deputy Staff Judge Advocate for the Eastern Recruiting Region of the Marine Corps. He was assigned to the investigation to provide legal advice to the investigating team. Captain Koleos was present during the investigation of RS Pittsburgh on January 30 and January 31, 1989. (Exhibit M, p. 4). He did not participate in the interviews conducted by the investigating team, and he left RS Pittsburgh prior to the completion of the investigation to attend a hearing in Newport, Rhode Island.

[18] The Evans investigation, which lasted two weeks, was an informal investigation pursuant to the Uniform Code of Military Justice. The members of the Command Group of RS Pittsburgh were not specifically targeted by the Evans investigation because the allegations of recruiting misconduct had been made against the recruiters of RS Pittsburgh.

or she understood their Article 31 rights. No allegations of recruiting misconduct had been made against plaintiff prior to the commencement of the Evans investigation, and, initially, plaintiff was elated by the investigation because he assumed it was initiated in response to his complaints in October, 1988 to Master Sergeant Zuro of the 4th Marine Corps District.

19. During the Evans investigation, an applicant named Michael Lockwood (Lockwood) was processed at the MEPS of RS Pittsburgh. When confronted with the false diploma in his recruit package, Lockwood alleged that plaintiff had procured the false diploma for him. Lockwood identified plaintiff by selecting him from a group photograph of members of RS Pittsburgh. He also identified plaintiff in Colonel Evans' presence, indicating that plaintiff was the Marine who had sold him the false diploma. Plaintiff informed Colonel Evans that he had never seen Lockwood before, and that his allegation was "bogus." Colonel Evans responded by indicating that it was a serious allegation. At this time, Master Sergeant Cawman of the investigating team accused plaintiff of having a printing press in his basement, an allegation which plaintiff claimed was ludicrous. Based on these allegations, plaintiff asked for legal counsel. In response, Captain Evans indicated that he was a legal advisor, and plaintiff talked to Captain Evans for 30 to 45 minutes.[19]

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[19] While he was a Captain in the 4th Marine Corps District, Captain Evans served as an advisor to the Commanding Officer in the area of personnel administration. Among his duties, Captain Evans advised the Commanding Officer on legal matters, a position that could be performed by Captain Evans despite the fact that he was not an attorney. In response to

Plaintiff told Captain Evans that he had never met Lockwood, and that he had never participated in making false diplomas. Captain Evans asked plaintiff to make a written statement.[20] Despite his request for counsel, plaintiff was never provided independent legal counsel. Plaintiff was relieved of recruiting duty, and he left the recruiting station distraught.

20. After the completion of his investigation of RS Pittsburgh, Colonel Evans prepared a report dated February 17, 1989 for Colonel Jones.[21] In summary, the preliminary statement to Colonel Evans' report states that "administrative procedures were not in place to insure that quality control received as much emphasis as production and shipping;" that current Marine Corps directives required recruiters to actually go to an applicant's high school to verify his or her education; that the policy in place at RS Pittsburgh allowed the recruiters to sign an

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plaintiff's allegation that Captain Evans represented himself to be legal counsel who could advise plaintiff, Captain Evans testified that he never represented himself as an attorney to anyone. He further testified that he was a legal advisor to the Commanding officer of the 4th Marine Corps District, not to the enlisted men. Plaintiff's testimony in this regard, however, was corroborated at trial by several other recruiters of RS Pittsburgh. Specifically, Staff Sergeant Cummings, Sergeant Felton M. Horton and Sergeant Paul E. Nye, Jr. testified that Captain Evans led them to believe that he was acting as their legal counsel during the Evans investigation.

[20] In his written statement dated February 2, 1989, plaintiff denies any alleged wrongdoing. (Exhibit P).

[21] There were 154 enclosures to the report, including 48 allegations by recruits, 55 statements and 51 supporting documents.

education verification after verifying an applicant's high school education by telephone; that recruiters were producing false high school diplomas when it was learned that applicants did not have high school diplomas; that, as a result, applicants were being shipped to boot camp without legitimate documents in their recruit packages; that the 20% random police checks required by the Military Personnel and Procurement Manual were not being done in RS Pittsburgh; that the lack of quality control, in combination with tremendous pressure from the Command Group, and, in particular, from the Commanding Officer, produced a situation where certain individuals in the field felt that they had to compromise their integrity in order the meet the demands of their mission; that faulty education verification procedures produced an inordinate number of discharges in RS Pittsburgh's DEP pool that the NCOICs were not working together as a team for the good of RS Pittsburgh; that RS Pittsburgh had an "in crowd," an "out crowd" and those who worked independently so as not to be in any crowd; that many NCOICs felt that plaintiff, the Recruiting Instructor, was the leader of one of these "cliques;" and the plaintiff's "clique" appeared to be where the bulk of recruiter malpractice was located in RS Pittsburgh. (Exhibit M).

21. With respect to his opinion of plaintiff, Colonel Evans states in the report: "In his capacity as the senior expert on enlisted recruiting, I feel he bears a tremendous amount of responsibility for the problems in Pittsburgh." Colonel Evans also states that he was not personally convinced that plaintiff made a false diploma as alleged

by Lockwood.[22] However, Colonel Evans had no doubt that plaintiff had knowledge that false diplomas and other documents were being made. He also did not accept plaintiff's claim that he lacked the training and experience to identify and deal with the problems in RS Pittsburgh. (Exhibit M, pp. 5-6).

22. Based on his investigation, Colonel Evans recommended various forms of discipline for 29 Marines in RS Pittsburgh, including members of the Command Group and recruiters. The recommended discipline ranged from letters of caution to nonjudicial punishment (NJP)[23] to summary and special court-martials[24] to relief

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[22] At trial, Colonel Evans testified that, based on the scale of fraud in RS Pittsburgh, it was inconceivable that plaintiff did not know what was going on. He was not convinced, however, that plaintiff was involved in procuring a false diploma for Lockwood. Although Colonel Evans did not know Lockwood's motive he testified that Lockwood was not a stable individual. Therefore, Colonel Evans discounted Lockwood's allegations.

[23] NJP is designed to allow a commander to quickly impose minor punishment for minor offenses committed by members of his command. *Military Criminal Justice, Practice and Procedure, 3d Edition,* David A. Schlueter, p. 39.

[24] A summary court-martial is designed to dispose of minor offenses in a simplified proceeding. It consists of one commissioned officer who may, but need not be, a lawyer. The accused, whose consent is a prerequisite to the proceeding, is normally not entitled to a detailed lawyer, but, upon request, may be represented by a civilian lawyer at no expense to the government or by an individually requested military counsel. Only enlisted service members may be tried by summary court-martial, and the maximum punishment that may be imposed by a summary court includes confinement at hard labor for one month, forfeiture of two-thirds of one month's pay for one month, hard labor without confinement for forty-five days or

for cause. (Exhibit M, P. 9). With respect to Major Eberhart, Colonel Evans recommended that he be relieved of duty due to his position as Commanding Officer. He made this recommendation despite his opinion that Major Eberhart did not intentionally direct the enlistment of any unqualified applicant into the Marine Corps. (Exhibit: M, p. 10). As to the MEPS liaison, Gunnery Sergeant Brown, Colonel Evans recommended NJP and relief for cause.[25] This recommendation was based on his opinion that Gunnery Sergeant Brown was derelict in the performance of his duties; that he was forthcoming in his admissions of wrongdoing; that he never attempted to mislead or lie to the investigating team; that he was

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restriction for two months. The special court-martial is the intermediate court in the military's judicial structure. Any service member may be tried by a special court-martial for any noncapital offense. Maximum punishments from this proceeding include confinement at hard labor for six months and forfeiture of two-thirds of one month's pay for six months. A bad conduct discharge may also be assessed if additional procedural protections are met, including the detail of a military judge and a defense counsel and the preparation of a verbatim record of the trial. *Military Criminal Justice, Practice and Procedure, A Edition,* David A. Schlueter, pp. 39-40.

[25] Colonel Evans testified at trial that Gunnery Sergeant Brown had the most allegations against him by recruits. However, during the investigation, no recruiter made any allegations against Gunnery Sergeant Brown. In fact, the Commanding Officer and many recruiters showed allegiance to Gunnery Sergeant Brown. Sergeant Horton, a recruiter at the Greensburg substation of RS Pittsburgh, testified at trial that the fraudulent recruiters loved Gunnery Sergeant Brown because "he got them the numbers." He further testified that somehow Gunnery Sergeant Brown managed to process the unqualified recruits.

unaware that the copies of documents he certified as true copies were actually copies of false documents; and that he did, at times, reject questionable documents.[26] (Exhibit M, pp. 15-16).

23. In his February 17, 1989 report, Colonel Evans made findings of fact with respect to the members of the Command Group and the recruiters for whom he recommended disciplinary action. As to plaintiff, Colonel Evans found that plaintiff was involved in the procurement of false diplomas for applicants Wayne Ballew (Ballew), Robert Grabowski (Grabowski), James Brough (Brough) and Angela Robinson (Robinson). These findings were based on statements taken by the Evans investigating team, including the statements of Staff Sergeant William R. Cummings,[27] the NCOIC of the Greensburg substation,

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[26] Captain Evans testified that, as the MEPS liaison, Gunnery Sergeant Brown was at least guilty of incompetence. He should have been aware of what was going on. However, there was little factual support for a finding of wrongdoing by Gunnery Sergeant Brown.

[27] Staff Sergeant Cummings' written statement dated February 2, 1989 alleges that, with respect to Ballew, Grabowski and Brough, plaintiff ordered him to "get it done," a phrase often used by plaintiff, which meant to make false diplomas for these individuals because they did not have high school diplomas. Staff Sergeant Cummings also alleges that plaintiff made sexual advances toward his finance; used his government-owned vehicle for personal use, and played "numbers" for people. (Exhibit W). In Colonel Evans' February 17, 1989 report, he found that Staff Sergeant Cummings made a false diploma for Ballew; that he used cocaine on two occasions and that he knew false diplomas were made for Robinson and Brough. Despite Staff Sergeant Cummings' statements and appearance before the investigation team, which were characterized as

and Corporal Scott A. Palmer,[28] a recruiter in the McKeesport/East McKeesport substation. The statements of Staff Sergeant Cummings and Corporal Palmer regarding plaintiff's involvement in the procurement of a false diploma for Ballew were corroborated by a statement obtained from Ballew's civilian wife, Tracey Ballew. (Exhibit G). Colonel Evans also found that plaintiff was involved in the improper education verification for Robinson based on a statement given by Sergeant Garnett J. Luttig, Jr., 21 another recruiter.[29] Colonel Evans also

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disorganized and rambling, Colonel Evans believed that he was at all times forthcoming. Due to the overwhelming allegations and seriousness of the charges against Staff Sergeant Cummings, Colonel Evans recommended that he be relieved for cause and tried by special court-martial. (Exhibit M, p. 16).

[28] In Corporal Palmer's statements to the Evans investigating team, he alleges that plaintiff told him to make a diploma for Grabowski, who was not going to receive his diploma because he owed $2,500.00 to his high school for stealing a computer. Corporal Palmer further alleges that plaintiff said to "get it done" or "make it happen," which were phrases frequently used by plaintiff. (Exhibit 1). In Colonel Evans' February 17, 1989 report, he found that Corporal Palmer knowingly produced and provided false diplomas for his enlistments and the enlistments of other recruiters. Colonel Evans recommended that Corporal Palmer be subjected to NJP and that his Extended Active Duty status be terminated. (Exhibit M, pp. 31-32).

[29] In his February 3, 1989 statement, Sergeant Luttig alleges that Robinson walked into his office the week before Christmas, stating that she was interested in joining the Marine Corps; that he, Staff Sergeant Cummings and plaintiff started screening Robinson; that he was unable to reach Robinson's high school to verify her education; and that plaintiff told him to write on the form that he had verified her education by telephone. (Exhibit N).

found that plaintiff improperly administered a test called the Armed Services Vocational Aptitude Battery (ASVAB) to Staff Sergeant Cummings and Corporal Sandra L. Miller.[30] Finally, Colonel Evans found that plaintiff routinely utilized his government-owned vehicle for personal business, (Exhibit M, pp. 29-30). In his findings of fact, Colonel Evans also notes that plaintiff denied having ever seen Lockwood or making his false diploma. Plaintiff further denied ever fraudulently enlisting, or directing the fraudulent enlistment, of any applicant.

24. In the opinion of Colonel Evans, plaintiff had knowledge of, and complicity in, the production and utilization of false diplomas. Moreover, plaintiff's familiarity with recruiting allowed him to routinely circumvent the intent of established procedures and to enlist unqualified applicants. Colonel Evans recommended that plaintiff be tried at a special court-martial for dereliction

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[30] With respect to plaintiff's administration of the ASVAB test to Corporal Miller, she testified at trial that she and plaintiff had discussed the possibility of her taking the test at the library; that, due to the timing requirements of the test, this site was not feasible; that she took the test in a trailer which belonged to plaintiff's friend; that she did well on the test; that she was asked about the test by the Evans investigating team, while she was still a recruiter aide; that she told the team that the test was properly administered; that she offered to take the test again; that her test score was never revoked; that she knows of no way in which plaintiff was derelict in his duty in connection with the administration of the ASVAB test to her and that she gave the Evans investigating team no evidence of any improprieties regarding her taking of the ASVAB test.

of duty and aiding and abetting in the fraudulent enlistment of applicants. He further recommended that plaintiff be relieved from recruiting duty. (Exhibit M, p. 30).

25. General Lynch was not satisfied with the briefing he received on the Evans investigation. He believed that the investigation did not sufficiently address the failure of the Command Group of RS Pittsburgh to fulfill their responsibilities. As a result, General Lynch told his Deputy Chief of Staff for Recruiting, Colonel Casey, to personally go to RS Pittsburgh to conduct a further investigation, focusing on the Command Group. The following individuals were assigned to assist Colonel Casey in his investigation: Major E.V. Kelley, legal advisor; Captain J.E. Evans, 4th Marine Corps District representative; Master Sergeant M.J. Styka; and Lance Corporal M.P. Jones, clerk/typist. Between March 8 and March 10, 1989, the Casey investigation conducted numerous interviews in RS Pittsburgh. Colonel Casey prepared a report of his investigation dated March 17, 1989, which includes the statements taken during the investigation.[31] (Exhibit 12).

26. In the preliminary statement to his report, Colonel Casey notes that, throughout the investigation, numerous allegations of misconduct were made against persons within the recruiting station. However, most allegations were not corroborated by independent facts and, typically, the allegations were refuted by the alleged perpetrator. To further complicate the situation, the person

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[31] Citing advice from legal counsel, plaintiff declined to be interviewed during the Casey investigation. (Exhibit 12, Enc. 17).

making an allegation often-appeared to le biased or possessed a motive to distort the facts. As a result, Colonel Casey resolved uncorroborated allegations in favor of the accused. Though there was evidence of criminal offenses and dereliction of duty, Colonel Casey was convinced that the problems "which befell the RS were the result of leadership failure." (Exhibit 12, pp. 2-3).

27. Based on his findings of fact with respect to plaintiff, it was Colonel Casey's opinion that plaintiff deliberately gave guidance to recruiters to falsely enlist high school juniors into the DEP; that plaintiff created high school diplomas for the purpose of unlawfully enlisting unqualified applicants into the Marine Corps; that plaintiff solicited Jerry L. Williams to join in his criminal enterprise; that plaintiff communicated a threat to Mr. Williams; and that plaintiff gave a false statement to Lieutenant Colonel Evans during his investigation of RS Pittsburgh. Based on his findings of fact and opinions, Colonel Casey recommended that plaintiff's alleged recruiting misconduct be investigated pursuant to Article 32 of the UCMJ, 10 U.S.C. § 832.[32] (Exhibit 12, p. 8).

28. With respect to Colonel Casey's findings relating to Jerry L. Williams, Mr. Williams was a civilian who

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[32] An Article 32 investigation under the UCMJ is the military's counterpart to the civilian grand jury. Like a grand jury proceeding, an Article 32 investigation is designed to avoid trials on baseless charges. *Military Criminal Justice, Practice and Procedure, 3d Edition*, David A. Schlueter, p. 275. Colonel Casey also recommended an Article 32 investigation of Major Eberhart, the Commanding officer of RS Pittsburgh.

owned a printing shop called Precision Printing in Bedford, Pennsylvania. During the Evans investigation, several recruiters alleged that the services of Precision Printing had been utilized to make false diplomas for certain recruiters. Because these allegations were unsubstantiated, they required further investigation. At the request of Major Kelley, legal advisor for the Casey investigation, Captain Koleos, Deputy Staff Judge Advocate for the Eastern Recruiting Region, called Mr. Williams on March 16, 1989 from Parris Island, South Carolina to interview him by telephone. Captain Koleos prepared a "Results of interview of Mr. Jerry Williams, owner of Precision Printing," which was attached to Colonel Casey's report as Enclosure 20. In his report, Captain Koleos indicates that Mr. Williams stated that plaintiff had contacted him about making a false diploma for an applicant who could not get a high school diploma, but who was otherwise qualified to enlist in the Marine Corps; that plaintiff wanted Mr. Williams to alter the name on an original diploma by typesetting another person's name, pasting it over the name on the original diploma and making a copy of the altered diploma; that he told plaintiff he would only make a typeset of a person's name; that plaintiff drove to his printing shop in Bedford, Pennsylvania and had a corporal drop off the information for the typeset; that plaintiff returned a few hours later to pay for and pick up the typeset; that the same scenario occurred a few days later; that, on a third occasion, plaintiff returned to Mr. Williams, printing shop and asked his wife to prepare typesets for 8 to 10 more names; that Mr. Williams, through his wife, told plaintiff that he would not do any more typesets; that plaintiff

tried to pressure him into making more typesets; and that Mr. Williams, his wife and other employees could positively identify plaintiff and the corporal who accompanied him.[33] (Exhibit 7).

29. Based on the allegations that had been made against him, plaintiff called Captain Louis J. Puleo, a defense attorney at the MCRD in Parris Island, South Carolina, and, in March, 1989, Captain Puleo assigned himself to plaintiff's case. On March 22, 1989, prior to plaintiff's hearing pursuant to Article 32 of the UCMJ, Corporal Palmer, one of the two recruiters who had implicated plaintiff in recruiting fraud, called Captain Puleo to ask a question. Captain Puleo informed Corporal Palmer that he was representing plaintiff, but he indicated that he would answer Corporal Palmer's question if possible. At that time, Corporal Palmer told Captain Puleo that the February 2, 1989 and February 8, 1989 statements he had given to the Evans investigating team regarding plaintiff's involvement in recruiting fraud were false. (Exhibit 3).

30. On March 27, 1989, charges were "preferred" against plaintiff for violations of Articles 80, 81, 84, 92 and 134 of the UCMJ, 10 U.S.C. §§ 880, 881, 884, 892 and

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[33] The information set forth by Captain Koleos in the "Results of interview of Mr. Jerry Williams" was directly contradicted by his trial testimony. At trial, Captain Koleos testified that, when he interviewed Mr. Williams, Mr. Williams could not remember the name of the Marine who had come to his shop for a false diploma. However, according to Captain Koleos, Mr. William's description of the Marine who came to his shop fit the description of plaintiff.

934.[34] (Exhibit 11). In summary, the following charges are set forth against plaintiff in the Charge Sheet:

Charge I:

Specification: wrongfully effecting the enlistment of Lockwood by falsely making a high school diploma[35]

Charge II:

Specification: conspiring with Corporal Palmer, Sergeant Horton and Staff Sergeant Cummings to effect the unlawful enlistment of ineligible personnel in the Marine Corps by making false high school diplomas

Charge III:

Specification 1: wrongfully effecting the enlistment of Ballew by directing that a false diploma and false education verification form be made

Specification 2: wrongfully effecting the enlistment of Robinson by directing that a false diploma and false education verification form be made

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[34] Anyone subject to the UCMJ may serve as an accuser and "prefer" charges. However, it is almost always the accused's immediate commanding officer who, after conducting a preliminary inquiry, directs that charges be drafted and a charge sheet prepared. *Military Criminal Justice, Practice and Procedure, 3d Edition,* David A. Schlueter, p. 236.

[35] It is interesting to note that, despite Colonel Evans' statements in his February 17, 1989 report and his testimony at trial that he was not convinced that plaintiff was involved in procuring a false diploma for Lockwood, plaintiff was nevertheless charged with that offense.

Specification 3: wrongfully effecting the enlistment of Brough by directing that a false diploma be made

Charge IV:

Specification 1: improper administration of the ASVAB test to Staff Sergeant Cummings

Specification 2: improper administration of the ASVAB test to Corporal Sandra Miller

Specification 3: dereliction of duty by willfully failing to comply with, and ensuring that other recruiters complied with, the educational criteria for enlisted recruiting established by the District Director

Charge V:

Specification 1: wrongful solicitation of Corporal Palmer to assist Grabowski in fraudulently, enlisting in the Marine Corps by telling Corporal Palmer to falsely make a high school diploma for Grabowski

Specification 2: wrongful solicitation of Jerry Williams, owner of Precision Printing, to assist in fraudulently enlisting a person into the Marine Corps by asking Mr. Williams to falsely make a high school diploma

Specification 3: wrongful solicitation of Jerry Williams, owner of Precision Printing, to assist in fraudulently enlisting a person into the Marine Corps by asking Mr. Williams to make a typeset of a person's name in order to falsely make a high school diploma

Specification 4: wrongful solicitation of Jerry Williams, owner of Precision Printing, to assist in fraudulently enlisting persons into the

> Marine Corps by asking Mr. Williams to make typesets on 8-10 persons in order to falsely make high school diplomas
>
> Specification 5: wrongfully communicating to Jerry Williams, owner of Precision Printing, a threat to cause economic harm to Mr. Williams by having the building lease between the Armed Services and Mr. Williams terminated if Mr. Williams did not assist plaintiff in making false diplomas
>
> Specification 6: signing a false statement under oath on February 2, 1989

(Exhibit 11).

31. On March 28, 1989, Corporal Palmer was called in for questioning by Captain Koleos, who had been designated as the military prosecutor for plaintiff's Article 32 hearing. At that time, Corporal Palmer told Captain Koleos that the statements he gave during the Evans investigation were false. In response, Captain Koleos indicated that he would have to call Colonel Evans and Captain Evans. Corporal Palmer exercised his Article 31 rights under the UCMJ, and he spoke with his defense counsel, First Lieutenant Ansa. After speaking with counsel, Corporal Palmer exercised his right to remain silent. In response, Captain Koleos stated that Colonel Jones would vacate his sentence of NJP, implying that, if Corporal Palmer said anything against Colonel Evans or Captain Evans, it would hurt him a great deal. (Exhibit 3).

32. On March 29, 1989, Corporal Palmer made the following statement under oath:

> I Cpl Scott A. Palmer do hereby make the following statement, on 28 March 1989 I was

> interviewed by Captain Koleos. During my conversation with the Captain I made it clear that I was going to say things in court that would incriminate LtCol Evans and Capt Evans, because I recanted my statements of February 2, 1989 and February 8, 1989. The reason I recanted my statements is that they were made under pressure and I was cohersed (sic) and told by LtCol Evans and Capt Evans what to say therefor (sic), making them false statements. During my conversation with Captain Koleos he made it unmistakeably (sic) clear that if I did not stick with my first two statements (which were false), that the sentence of my February 24, 1989 NJP would be vacated, which means a reduction in rank and forfiture (sic) in pay. This came across to me as a threat.
>
> I am making this statement because I know that I will eventually have to make these statements in court and I know that they will vacate my sentence. And I want to have record of my knowledge of this prior to it happening.
>
> What I am saying is true and I do not feel an innocent man should be judged on statements that someone was pressured into making.

(Exhibit 2).

This statement was incorporated into a "Stipulation of Expected Testimony" for plaintiff's Article 32 hearing.[36] (Exhibit 5).

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[36] As noted earlier, after his investigation of the recruiting fraud in RS Pittsburgh, Colonel Evans recommended that Corporal Palmer be subjected to NJP. NJP would not have precluded an honorable discharge from the Marine Corps. At

33. With respect to the charges against plaintiff relating to Mr. Williams of Precision Printing, which are set forth in Charge V, Specifications 2 through 5 of the Charge Sheet, Mr. Williams testified in his deposition that he returned a telephone call from plaintiff, and told plaintiff that the investigators was breathing down his neck to implicate plaintiff. While he felt that the prosecution was doing a thorough investigation, Mr. Williams also felt that the prosecutor was trying hard "to get the goods" on plaintiff because plaintiff's name was mentioned more than the name of any other Marine. According to Mr. Williams, the investigators thought that plaintiff was responsible for the whole recruiting fraud scheme. Mr. Williams told the investigators that he did not know plaintiff, and that he could not link plaintiff to the false diplomas.[37] Mr. Williams refused to sign a statement prepared by Captain Koleos, which identified plaintiff as the

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trial, Corporal Palmer testified that, after he indicated that he wanted to recant his February 2 and February 8, 1989 statements due to their falsity, the Evans investigating team pressured him to continue lying. Specifically, Corporal Palmer testified that Captain Evans took him into the cafeteria of the Federal Building in Pittsburgh when it was closed and gave him the Marine Corps "pride" speech. He testified that Captain Evans said it was in his best interest to stick with his original statements. However, Corporal Palmer refused to do so. Thereafter, Corporal Palmer's NJP was vacated and he was charged with making false statements to the Evans investigating team. Rather than being subjected to a trial by court-martial and the possibility of imprisonment, Corporal Palmer opted to take an "Other Than Honorable" discharge from the Marine Corps.

[37] Mr. Williams' testimony directly contradicts the "Results of interview of Mr. Jerry Williams, prepared by Captain Koleos after his telephone interview of Mr. Williams" on March 16, 1989. (Exhibit 12, Enclosure 20). In fact, Mr. Williams testified

Marine who was coming in for false diplomas. Mr. Williams told Captain Koleos that he would sign a statement if it was factually correct.[38] Thereafter, Mr. Williams called plaintiff to warn him that the investigators were out to get him.[39] Plaintiff contacted Captain Puleo, his defense counsel, to tell him about the telephone conversation with Mr. Williams and a visit to Mr. Williams' printing shop was arranged for March 30, 1989. Mr. Williams testified that he was asked to have Annette, his wife, and Sherry, another woman who worked in the printing shop, present for the visit. Captain Puleo and plaintiff arrived at the printing shop first. Plaintiff waited outside for about 10 minutes, while Captain Puleo went in to talk to Mr. Williams, Annette and Sherry. When plaintiff walked into the shop, Captain Puleo asked them if plaintiff was one of the Marines who had purchased false diplomas, and they indicated that he was not. In fact, they indicated that plaintiff did not look anything like the Marines who

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that he never told Captain Koleos that plaintiff was the sergeant who kept calling him for false diplomas because he did not know the sergeant's name. Mr. Williams testified that it was Captain Koleos who kept inserting plaintiff's name.

[38] Contrary to Charge V, Specification 5, which accuses plaintiff of threatening Mr. Williams with economic harm if he did not assist plaintiff in making false diplomas, Mr. Williams testified that it was the investigators who threatened him. Specifically, Mr. Williams testified that he was told that he was also under investigation; that he could be charged as a result of the investigation and that the FBI could possibly be notified of his conduct.

[39] Telephone records submitted by plaintiff show that Mr. Williams called him on March 29, 1989 at 1:10 p.m. at his office in RS Pittsburgh. (Exhibit 6).

had been to the shop. When Captain Koleos arrived shortly thereafter, he was unhappy that Captain Puleo had already talked to Mr. Williams, Annette and Sherry. An argument ensued between Captain Koleos and Captain Puleo because Captain Koleos was concerned that Mr. Williams had been "coached" by defense counsel. Based on the failure of plaintiff to be identified as one of the Marines who had purchased false diplomas from Precision Printing, Charge V, Specifications 2 through 5 were withdrawn by the government prior to plaintiff's Article 32 hearing.[40]

34. Major Ellen B. Healy was designated to act as the Investigating Officer for plaintiff's Article 32 investigation, and the Article 32 hearing took place in Pittsburgh, Pennsylvania on April 2 and April 3, 1989. (Exhibit 41). The government was represented by Captain Koleos, and plaintiff was represented by Captain Puleo. Captain Evans and Sergeant Horton, a recruiter from the Greensburg substation of RS Pittsburgh, testified for the government.[41] In addition, the statements of other

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[40] Based on the withdrawal of these charges, Charge V, Specification 6 was renumbered Charge V, Specification 2.

[41] Sergeant Horton was charged with recruiting fraud as a result of the Evans investigation, and he received NJP. He was reduced in rank from a sergeant to a corporal and a fine was imposed upon him. He was not discharged from the Marine Corps, however. During plaintiff's Article 32 hearing, Sergeant Horton testified that he enlisted Ballew; that he was aware that Staff Sergeant Cummings had made a false diploma for Ballew; that plaintiff was not aware of Ballew's false diploma; that Staff Sergeant Cummings told him never to say anything to plaintiff about their illegal activity because plaintiff would turn them in; that he witnessed Staff Sergeant Cummings doing cocaine in the

witnesses were offered. In her report of the Article 32 hearing, Major Healy observed that, overall, the government was unable to present key testimony. She noted that, with the exception of Charge III, Specification 2, the charges were not supported by the evidence presented at the Article 32 hearing. In connection with Charge III, Specification 2, which related to the wrongful enlistment of Robinson, Major Healy remarked that the evidence reasonably supported this specification in part. Although Sergeant Luttig testified emphatically that plaintiff did not know about the false diploma for Robinson, he did testify that plaintiff directed him to fill out a false education verification form. However, Sergeant Luttig also testified that plaintiff told him to verify it the following day. Based on the evidence presented by the government at plaintiff's Article 32 hearing, Major Healy recommended that plaintiff be subjected to NJP, which is the lowest form of punishment that can be imposed. (Exhibit 13). On April 6, 1989, plaintiff was ordered to report to the MCRD in Parris Island, South Carolina.

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recruiting substation; that he had personal knowledge that Staff Sergeant Cummings committed insurance fraud by damaging his own vehicle and filing insurance claims on several occasions; and that a second false diploma was made for Ballew by Corporal Palmer because Ballew's recruit package had been lost. At trial, Sergeant Horton testified that, after his testimony at plaintiff's Article 32 hearing, which was favorable to plaintiff, the Marine Corps retaliated against him by vacating his NJP and filing additional charges against him. Rather than be subjected to a trial by court-martial, Sergeant Horton testified that he opted for an "Other Than Honorable" discharge from the Marine Corps.

35. Prior to the Article 32 hearing, Captain Puleo interviewed applicants Robinson, Brough, Grabowski and Ballew. In addition, he interviewed Ballew's civilian wife, Tracey Ballew, and an individual named John Clougheny. Captain Puleo took the statements of these individuals under oath to rebut the allegations of recruiting misconduct against plaintiff, and a compilation of these witness statements was attached to plaintiff's Article 32 investigation. (Exhibit 21). In Robinson's statement, she states that she only had a GED. Therefore, Staff Sergeant Cummings arranged for a false high school diploma to be made for her so she could enlist in the Marine Corps. She further states that plaintiff did not know about her false high school diploma. In Brough's statement, he states that Staff Sergeant Cummings and Corporal Palmer were aware that his "buddy" made a false high school diploma for him; that Staff Sergeant Cummings said to keep it their "little secret;" and that he never met plaintiff. In Grabowski's statement, he states that he did not know plaintiff and, to his knowledge, plaintiff did not know anything about his false high school diploma. Grabowski indicates that he talked to a Marine, who he believed to be Staff Sergeant Cummings, about his diploma, and the Marine told him not to say anything about the false diploma to anyone. In Ballew's statement, he states that Staff Sergeant Cummings had a false diploma made for him; that Staff Sergeant Cummings told him not to tell anyone about the false diploma; that Sergeant Horton was present for all of the conversations about a false diploma; that he could not ship to basic training because he needed a dependency waiver; that plaintiff walked

into the office as Staff Sergeant Cummings was explaining the meaning of a dependency waiver; that this was the first time he met plaintiff; that plaintiff said to prepare a dependency waiver regarding Ballew's child; that Staff Sergeant Cummings held up two copies of a diploma with Ballew's name on it; that he asked plaintiff what he thought about the diploma; that he could not recall plaintiff's response; that he did not know if plaintiff knew the diplomas were false; that plaintiff left the office thereafter and he never saw plaintiff again; that Sergeant Horton called him in October or November, 1988 to tell him that his recruit package had been lost; that Sergeant Horton asked him to get a diploma from a friend and he did so; that, a few days later, Sergeant Horton had copies of a false diploma with his name on them; and that Sergeant Horton told him not to say anything about the false diplomas. In Tracey Ballew's statement, she indicates that she did not know if plaintiff was aware of the false diplomas made for her husband by Staff Sergeant Cummings. She had no evidence that plaintiff knew the diplomas were false. Mrs. Ballew also states that Captain Hoffman, a member of the Evans investigating team, stated that he had been trying to "pin" something on plaintiff so they made Mrs. Ballew pick plaintiff out of a photograph and identify him as a Marine who had seen the false diplomas made by Staff Sergeant Cummings. Finally, the statement of John Clougheny indicates that he has known Staff Sergeant Cummings since high school; that he saw Staff Sergeant Cummings during the Evans investigation and asked him what was going on; that Staff Sergeant Cummings indicated that he was getting "kicked out" of the Marine

Corps and being brought up on charges; and that Staff Sergeant Cummings stated that he "was not going down alone, he was taking other people with him whether they were guilty or not."

36. During plaintiff's Article 32 hearing, Captain Puleo, plaintiff's defense counsel, was unable to interview Lockwood, the applicant who had implicated plaintiff in falsifying diplomas. At some point, Captain Puleo was able to locate Lockwood for an interview. Lockwood told Captain Puleo that he had lied when he told the Evans investigating team that plaintiff had participated in the scheme to falsify his diploma. Lockwood stated that Master Sergeant Cawman told him that he would have to implicate plaintiff, and he told Lockwood what to say. Based on Lockwood's allegations, Captain Puleo preferred charges against Master Sergeant Cawman on June 19, 1989. (Exhibit 9). The Charge Sheet against Master Sergeant Cawman sets forth two charges. In Charge I, Master Sergeant Cawman is accused of wrongfully endeavoring to impede an investigation by the Director of the 4th Marine Corps District into allegations of recruiting misconduct by plaintiff by wrongfully influencing Lockwood to knowingly make false statements to the investigating team. In Charge II, Master Sergeant Cawman is accused of conspiring with Lockwood to obstruct justice in connection with the investigation conducted into recruiter misconduct in RS Pittsburgh. (Exhibit 9). Captain Puleo gave the Charge Sheet to Captain Koleos to be forwarded to the Commanding General of the MCRD in Parris Island, South Carolina. Shortly thereafter, Captain Puleo found the Charge Sheet in the waste basket. When he confronted Captain Koleos about

his discovery, Captain Koleos assured him that the Charge Sheet had been sent through the proper channels. Master Sergeant Cawman was never prosecuted in connection with the charges preferred by Captain Puleo.[42]

37. On April 7, 1989, Lockwood was interviewed by Special Agent M.S. Mandell of the Naval Investigative Service (NIS) and Major Victor Kelley, legal advisor for the Casey investigation, concerning the Evans investigation. The report of that interview indicates that Lockwood told the investigators that he made a false diploma

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[42] Lockwood's allegations against Master Sergeant Cawman were corroborated by the testimony of plaintiff and his wife, which the court finds to be credible. In the Spring of 1988, plaintiff brought Master Sergeant Cawman and Master Sergeant Zuro home for dinner. At that time, plaintiff's wife, Debora, had a craft shop in the back of their house. Mrs. Morgan moved her craft shop out of their house and down the street to a regular shop in early Summer, 1988. At plaintiff's Article 32 hearing, Captain Evans testified that, when Lockwood was brought before the Evans investigating team, Lockwood told the investigators that a friend took him to a house to get a false diploma for a fee. Captain Evans further testified that Lockwood described the house for the investigators "as being a kind of Novelty shop, a pool and some other things." Although the description did not mean anything to Captain Evans, he testified that several of the investigators indicated that they recognized the description and those investigators told Colonel Evans that the description fit plaintiff's house to a "T." Because Mrs. Morgan's craft shop had already been moved by the time Lockwood was alleging he had been taken there to get a false diploma, it is clear that someone was schooling Lockwood to implicate plaintiff in the recruiting fraud. The fact that Master Sergeant Cawman had been to plaintiff's house for dinner prior to the craft shop being moved supports Lockwood's allegations that Master Sergeant Cawman was fabricating evidence against plaintiff.

for himself at the direction of his recruiter, Sergeant Dean G. Selzer. When he was confronted by Master Sergeant Cawman with the false diploma and brought before the Evans investigation team, Lockwood stated that he told the truth about the circumstances surrounding his false diploma. Lockwood alleged that Master Sergeant Cawman took him aside and convinced him that his interests would be served if he told the investigation team what it wanted to hear, *i.e.* that plaintiff had the diploma made for him. Lockwood was convinced that if he implicated plaintiff, "the colonel" would do everything he could to get him into the Marine Corps. As a result, Lockwood went before the investigating team again and changed his story. Lockwood stated that he had never met plaintiff; however, Master Sergeant Cawman had "schooled" him in the identification of plaintiff by pointing plaintiff out in a group photograph. Lockwood stated that he did not know Master Sergeant Cawman's motives.[43] (Exhibit 45).

38. On May 9, 1989, plaintiff wrote to the late Senator John Heinz "to bring to [his] attention abuses by the Command with regard to [the Evans] investigation and the charges against [plaintiff]."[44] In the letter, plaintiff

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[43] In connection with Master Sergeant Cawman's possible motives for "schooling" Lockwood to implicate plaintiff in recruiting fraud, plaintiff testified that Master Sergeant Cawman was jealous of him because, despite the fact that Master Sergeant Cawman had been in the Marine Corps longer than plaintiff, plaintiff was asked to be a member of the Contact Team in 1987. When plaintiff declined the appointment, Master Sergeant Cawman was given the position.

[44] Plaintiff enclosed the following documents with his letter to Senator Heinz: plaintiff's Charge Sheet; the NIS Results

describes the charges filed against him as a result of the Evans investigation and the alleged misconduct of the investigation team in connection with each charge. Plaintiff states in part: " . . . I initially believed I would be vindicated by an investigation; however, it appears, at least in 5 specific instances, (Mr. Lockwood, Mrs. Ballew, Corporal Palmer, Mr. Jerry Williams and Mr. Brough), the investigating team actively sought to falsify evidence, coerce witnesses and suborn perjury in order to gather charges against me. . . . " Plaintiff concludes the letter by asking Senator Heinz for an "objective and impartial study of the enclosures in making a determination as to whether such investigation was proper."[45] (Exhibit 15A).

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of Interview of Michael Lockwood; the letter of Corporal Scott Palmer stating that he was recanting his February 2 and February 8, 1989 statements because they were false and the product of coercion; and the statements of Wayne Ballew, Tracey Ballew, Angela Robinson, James Brough and Robert Grabowski.

[45] By letter dated June 22, 1989, Senator Heinz informed plaintiff that he had made an inquiry into the matters raised in plaintiff's May 22, 1989 letter, and that he had received a reply from the Headquarters of the Marine Corps. The reply to Senator Heinz's inquiry was sent by Major C.L. Scovel, III, Assistant Staff Judge Advocate for Military Law in Washington, D.C. In his reply, Major Scovel indicates that an Article 32 investigation under the UCMJ was convened to inquire into allegations of illegal recruiting practices against plaintiff; that the investigating officer in plaintiff's case had completed her inquiry and presented her written report of the investigation; that Captain Puleo, a lawyer certified by the Judge Advocate General of the Navy, was assigned to represent plaintiff without charge during the investigation; and that, since judicial proceedings were possible, comment by the Commandant of the Marine Corps on the validity of the charges would be inappropriate. (Exhibit 34).

39. General Lynch declined to accept Major Healy's recommendation after the Article 32 hearing that plaintiff be subjected to NJP, and he ordered a further investigation of plaintiff. The continued investigation resulted in new charges being filed against plaintiff on June 29, 1989 (Exhibit 14), and plaintiff's Article 32 hearing was reopened the next day, June 30, 1989, in Parris Island, South Carolina. (Exhibit 42). The second Charge Sheet sets forth the following charges against plaintiff under Articles 81, 84, 92, 107, 132 and 134 of the UCMJ, 10 U.S.C. §§ 881, 884, 892, 907, 932 and 934:

Charge I:

Specification: conspiring with Corporal Palmer, Sergeant Luttig, Sergeant Horton and Staff Sergeant Cummings from August, 1988 to January, 1989 to effect the unlawful enlistment of ineligible personnel in the Marine Corps by making false high school diplomas

Charge II:

Specification 1: fraudulently effecting the enlistment of Ballew by falsely documenting his actual educational status

Specification 2: fraudulently effecting the enlistment of Robinson by falsely documenting her actual educational status

Specification 3: fraudulently effecting the enlistment of Brough by falsely documenting his actual educational status

Specification 4: fraudulently effecting the enlistment of Grabowski by falsely documenting his actual educational status

Charge III:

Specification 1: improper administration of the ASVAB test to Staff Sergeant Cummings

Specification 2: violation of a lawful general order by wrongfully participating in gambling activities while on duty as Recruiting Instructor and on the premises of various recruiting stations in RS Pittsburgh

Charge IV:

Specification: making a false official statement with, the intent to deceive on July 18, 1988 regarding drug use by members of recruiting substation Greensburg

Charge V:

Specification: presenting a false and fraudulent claim for travel expenses on October 25, 1988 in the amount of $137.25[46]

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[46] This charge pertains to plaintiff's trip to Philadelphia, Pennsylvania to attend the NCOIC conference in October, 1988. In connection with this charge, plaintiff testified that Staff Sergeant Cummings asked plaintiff to drive his car to Philadelphia because he was leaving after the event. Plaintiff agreed to drive the car and to pay the tolls and gas, which he did. To rebut the validity of this charge, plaintiff submitted into evidence the military's regulation regarding the use of "privately owned conveyances" incident to temporary duty. This regulation indicates that plaintiff would have been entitled to be reimbursed for the operating expenses he incurred as a result of driving Staff Sergeant Cummings' car to the NCOIC conference. (Exhibit 35).

Charge VI:

Specification: making a false statement under oath on February 2, 1989 to Lieutenant Colonel J.S. Evans

(Exhibit 14).

Charge III, Specification 2, Charge IV and Charge V set forth new charges against plaintiff.

40. The remarks to Major Healy's report of the reopened Article 32 hearing dated July 3, 1989 provide as follows:

> This Article 32 hearing was reopened 30 Jun 89 and charges preferred 29 Jun 89 were investigated by Major E.B. Healy upon the 30 Jun 89 oral instructions of Major General J.D. Lynch, Jr.. The charges dated 29 Mar 89 were withdrawn by the government. Informtion (sic) received at earlier sessions was considered. Two witnesses, SSgt Cummings and Cpl Palmer, who had not testified at the earlier sessions, received grants of immunity prior to the 29 Jun session and testified.

(Exhibit 18, p. 2).[47]

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[47] The report of Major Healy indicates that Captain Puleo, plaintiff's defense counsel, requested a continuance of the reopened Article 32 hearing "based on lack of notice that the Article 32 was going to be reopened (received notice on 29 June 1989) and failure of the government to provide a new charge sheet until 0900 the day of the investigation." Major Healy denied defense counsel's request for a continuance; however, she delayed the hearing until 1400 to give defense counsel an opportunity to review the charges and additional documents and to conduct additional interviews. The investigating officer

In her report, Major Healy indicates that counsel for the government called her on July 1, 1989 and withdrew Charge IV and its specification, which related to making a false official statement with the intent to deceive regarding drug use by members of the Greensburg recruiting substation. Major Healy further indicates that the government presented evidence with respect to Charges I, II and VI. She notes, however, that the key evidence was provided by Staff Sergeant Cummings, who was testifying under a grant of immunity, who had previously lied, who had directed subordinates to make false diplomas, and who had admitted to cocaine use while on recruiting duty.[48] Major Healy also notes that the government called witnesses whose testimony negated Staff Sergeant Cummings' allegations. (Exhibit 18, p. 5). Nevertheless, Major Healy recommended that plaintiff be tried by general court-martial.[49]

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believed that the delay "was ample in light of the fact that the defense counsel has had more than two months to discuss the case with the accused and at least 10 days to conduct interviews with the two witnesses who testified at the 30 June 1989 session." (Exhibit 18, p. 5).

[48] With respect to Staff Sergeant Cummings' motivation to falsely implicate plaintiff in recruiting fraud, plaintiff testified that he did not like Staff Sergeant Cummings; that Staff Sergeant Cummings was a chronic, habitual liar who had psychological problems; and that plaintiff brought these facts to the attention of the Commanding officer of RS Pittsburgh. Further, several recruiters testified at trial that Staff Sergeant Cummings did not like plaintiff because plaintiff had reported Staff Sergeant Cummings' drug use and Staff Sergeant Cummings was compelled to attend counseling for this problem.

[49] Trial by general court-martial is the highest trial level in military law. This forum may be composed of a military judge

41. In July, 1989, Staff Judge Advocate Colonel G.W. Jones prepared a "Pretrial Advice for General Court-Martial" for General Lynch regarding the recommendation that plaintiff be tried by general court-martial.[50] The pretrial advice provides in relevant part:

> 4. *MAXIMUM PERMISSIBLE PUNISHMENT.* If convicted of the offenses alleged by a General Court-Martial, the accused could be sentenced to a maximum punishment which includes a dishonorable discharge; confinement for 35 years, 6 months, forfeitures of all pay and allowances, and reduction to the lowest enlisted pay grade.
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> 4. *OPINION*
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> a. The charges and specifications allege offenses under the Uniform Code of Military Justice.

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sitting alone or a combination of at least five members with a military judge presiding. The only limits upon a general court martial sentence are those set for each offense, and may include the death penalty, a dishonorable discharge or bad-conduct discharge. *Military Criminal Justice, Practice and Procedure, 3d Edition*, David A. Schlueter, p. 41.

[50] Before charges may be "referred" to a general court-martial, the highest court-martial, two statutory criteria must be met. First, Article 32 of the UCMJ requires a formal investigation of the charges. Second, Article 34 of the UCMJ requires the general court-martial convening authority to seek the formal written advice of his staff judge advocate. These two instruments present the general court-martial convening authority with the necessary actual and legal predicates for proceeding. *Military Criminal Justice, Practice and Procedure, 3d Edition*, David A. Schlueter, p. 275.

b. The allegation of each offense is warranted by the evidence.

c. A General Court-Martial convened by the Commanding General, Marine Corps Recruit Depot/Eastern Recruiting Region, Parris Island, South Carolina, would have jurisdiction over the accused and those offenses warranted by the evidence.

5. *RECOMMENDATIONS.*

a. *By the Investigating Officer.* Based on the evidence presented at the initial Article 32 pretrial investigation, the Investigating Officer recommended non-judicial punishment. Subsequent to the session conducted on 30 June 1989, the Investigating Officer recommends trial by General Court-Martial.

b. *By the Staff Judge Advocate.* Based on the testimony and evidence presented at all sessions of the Article 32 pretrial investigation, I concur with the Investigating Officer's recommendation, and recommend trial by General Court-Martial on the charges and specifications set forth at Enclosure (1).

(Exhibit 17).

42. Plaintiff's trial by general court-martial was scheduled for Tuesday, August 8, 1989 in Parris Island, South Carolina. One week before the scheduled trial, Captain Koleos, the military prosecutor, suggested to Captain Puleo that plaintiff opt for an "Other Than Honorable" (OTH) discharge in lieu of trial by general court-martial. However, Captain Puleo declined the offer. Captain Koleos then asked defense counsel if his position

would be different if the government had in its possession plaintiff's notebook that recorded plaintiff's gambling activities. The notebook, which was repeatedly referred to during the trial of this action as the "gray book," had allegedly been taken from plaintiff's car by Staff Sergeant Cummings, who had been given permission by Captain Koleos to travel to Pittsburgh to retrieve it. Later that week, on Thursday or Friday, Captain Koleos told Captain Puleo that Staff Sergeant Cummings was bringing the gray book to Parris Island, South Carolina for plaintiff's court-martial trial. On Saturday, August 5, Captain Koleos again told Captain Puleo that Staff Sergeant Cummings had the gray book. However, Captain Koleos claimed that he did not know the location of Staff Sergeant Cummings. That afternoon, Captain Puleo went to Captain Koleos' office and Captain Koleos was talking to Staff Sergeant Cummings on the telephone. Captain Puleo indicated to Captain Koleos that he wanted to talk to Staff Sergeant Cummings before he ended their conversation, and Captain Koleos nodded, indicating that he understood the request. Despite Captain Puleo's request, Captain Koleos hung up the telephone quickly without allowing Captain Puleo to talk to Staff Sergeant Cummings, and Captain Puleo became angry. Captain Koleos stated that Staff Sergeant Cummings was on his way to Parris Island, South Carolina with the gray book. He also stated that the offer to allow plaintiff to take an OTH discharge in lieu of trial by general court-martial was only open until the government's witnesses and the gray book arrived in Parris Island, South Carolina.

43. On Monday morning, August 7, 1989, Captain Puleo spoke to Captain Koleos again about the gray book, and Captain Koleos indicated that Staff Sergeant Cummings had the gray book. Based on Captain Koleos' representations about the gray book, plaintiff decided to accept the government's offer of an OTH discharge in lieu of trial by general court-martial,[51] and he submitted a request for administrative discharge under other than honorable conditions in lieu of trial by court-martial. In the request, plaintiff pleaded guilty to Charge III, Specification 2 of his Charge Sheet, which accused plaintiff of wrongfully participating in gambling activities while on duty as the Recruiting Instructor.[52] (Exhibit D). The request was approved the same day. (Exhibits F and S).

44. After plaintiff's request for an OTH discharge was approved, Captain Puleo walked into the office of

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[51] Plaintiff opted for an OTH discharge despite his claim that the gray book did not exist and despite Captain Puleo's position that he had impeachment evidence as to five of the six witnesses who would testify on the government's behalf in connection with the gambling charge. As to the remaining witness, Kirby Croft, a Pennsylvania State Trooper, Captain Koleos testified that Trooper Croft was going to testify that the establishment of a "bookie" had been raided and "flash," which he described as names and numbers relating to booking activities, had been seized. Plaintiff's name and address were among the "flash." However, the "bookie" was plaintiff's landlord and Trooper Croft apparently could not explain the meaning of all the symbols in the "flash." In the opinion of Captain Puleo, Trooper Croft's testimony implicating plaintiff in gambling activities was a "real stretch."

[52] In terms of maximum possible punishment, the gambling charge was the least serious offense. It carried a maximum punishment of 2 years' imprisonment.

Captain Sweeney, who was Staff Sergeant Cummings' defense counsel. Staff Sergeant Cummings was present, and he told Captain Puleo that he had been in constant contact with Captain Koleos the previous weekend. He also told Captain Puleo that he never had the gray book in his possession, maintaining that he only told Captain Koleos that he was looking for the gray book. Finally, Staff Sergeant Cummings told Captain Puleo that Captain Koleos had promised him a general discharge in exchange for his testimony against plaintiff. When Captain Puleo confronted Captain Koleos with Staff Sergeant Cummings' statements, Captain Koleos stated that Staff Sergeant Cummings had told him that he was in possession of the gray book. Captain Koleos also denied that he had promised Staff Sergeant Cummings a general discharge.

45. Thereafter, Captain Puleo filed a motion to dismiss the charges against plaintiff based on prosecutorial and governmental misconduct. (Exhibit 19). In the motion, Captain Puleo describes in detail the following alleged misconduct by members of the Evans investigating team and by the military prosecutor, Captain Koleos:

a. The solicitation of Lockwood by Master Sergeant Cawman to falsely implicate plaintiff in the sale and delivery of a false diploma;

b. Captain Evans' statement to Corporal Palmer that the Evans investigation team was out to "burn" plaintiff;

c. Captain Evans' instructions to Corporal Palmer as to what Corporal Palmer should write in his statement to implicate plaintiff in recruiting fraud;

d. Captain Evans' representations to plaintiff, Sergeant Nye, Sergeant McMahon and Staff Sergeant Cummings that he was acting as their "legal representative";

e. Captain Koleos' interview of Corporal Palmer on March 29, 1989 without the benefit of Article 31 rights under the UCMJ, despite Corporal Palmer's previous admissions of wrongdoing. Captain Koleos' threats to Corporal Palmer regarding the vacation of his sentence of NJP if he changed the statements he made to the Evans investigating team. Captain Koleos' offer of Corporal Palmer's two statements at plaintiff's initial Article 32 hearing, despite his knowledge that the statements were false;

f. The preferral of charges against Corporal Palmer for recanting his statements implicating plaintiff;

g. The continued interrogation of Corporal Palmer by Captain Koleos, despite Corporal Palmer's invocation of his right to remain silent and his right to counsel;

h. The conduct of Captain Evans in taking Corporal Palmer to another area and giving Corporal Palmer an "integrity" speech after Corporal Palmer had expressed his desire to exercise his right to remain silent and his right to counsel;

i. The promises made by the Evans investigating team to Staff Sergeant Cummings that, if he implicated plaintiff in illegal activities, the team would dispose of his charges in a favorable manner and he could remain on recruiting duty;

j. The prosecutor's indication to Staff Sergeant Cummings that, if Staff Sergeant Cummings could get Ballew to testify against plaintiff, he

would drop some of the charges against Staff Sergeant Cummings;

k. The conduct of the prosecutor in initiating communications with Staff Sergeant Cummings throughout the investigation without notice to Staff Sergeant Cummings' defense counsel;

l. The grant of immunity to Staff Sergeant Cummings to testify against plaintiff on the implied condition that he testify in accordance with his previous statements;

m. The conduct of the prosecutor in indicating to Staff Sergeant Cummings that he would be given a "Good of the Service" discharge if he supplied information that incriminated plaintiff;

n. The government's retaliation against Sergeant Horton, a recruiter, for testifying favorably to plaintiff at his initial Article 32 hearing by preferring charges against Sergeant Horton and subjecting him to an Article 32 hearing; and

o. Captain Koleos' false representations to Captain Puleo regarding the availability of the government's evidence. Captain Koleos' false representations that a government witness was in possession of an alleged notebook belonging to plaintiff and that such evidence was in route to Parris Island.

Based on the alleged misconduct, Captain Puleo sought the dismissal of the charges against plaintiff on due process grounds. The motion was not granted.

46. On August 8, 1989, the day after he had submitted the request for an OTH discharge, plaintiff submitted

a request to withdraw the OTH discharge.[53] (Exhibit 20). The request was based on plaintiff's reliance on the government's representations that it had the gray book in its possession. The request states in relevant part:

> 3. It should be noted that during the pre-trial negotiations, on 6th and 7th August, when an Administrative separation was being discussed Government counsel specifically asked whether the existence of the subject evidence would persuade me to submit an administrative separation. My counsel indicated that the existence of such evidence would in fact change my position in this regard. Since trial was scheduled for 8 August and negotiations would cease at close of business on 7 August, in reliance upon the representation of Government counsel, I submitted my request for separation.

If plaintiff's request had been granted, his trial by general court-martial would have proceeded.[54]

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[53] The request was prepared by Captain Puleo for plaintiff's signature.

[54] Under military law, a person accused of an offense must be tried within 120 days of the date the charges are preferred. In plaintiff's case, the last day of his "speedy trial" time was August 8, 1989, the date of his scheduled trial by general court martial. Although Captain Puleo testified that he expected plaintiff's August 8th request to withdraw his OTH discharge to be treated as defense delay, which would have tolled the "speedy trial" clock, there is no indication in the request that plaintiff was willing to waive his "speedy trial" rights and the filing of the request itself would not have stopped the "speedy trial" clock. By August 9, 1989, plaintiff's "speedy trial" time would have expired.

47. After plaintiff submitted his request to withdraw the OTH discharge, the Staff Judge Advocate, Colonel Jones, interviewed both Captain Koleos and Captain Puleo, and, on August 9, 1989, he sent a memo to General Lynch recommending disapproval of the request. The memo states in part:

* * *

> 3. The evidence in question, a grey book consisting of memorandum records of the respondent's gambling transactions with his customers, was never in the possession of the government counsel nor was it ever represented to be so. The government counsel indicated to respondent's counsel that a government witness had taken the book from the respondent's vehicle in December, 1988, claimed that he possessed it, and was making efforts to bring it under the control and custody of the government counsel by the close of business on 7 August 1989.
>
> 4. Whether or not the representations of government counsel were the causal factor in the submission of the request is speculative at best. It should be noted however, that the respondent did not indicate in his request for separation that he considered the book to be the dispositive evidentiary factor in his decision to avoid trial by court-martial. Furthermore, the government was not relying upon its production to obtain a conviction but rather the testimony of six witnesses and other corroborative documentary evidence.

(Exhibit E).

On the same day, August 9, General Lynch disapproved plaintiff's request to withdraw the OTH discharge.[55] (Exhibit B). On August 9, General Lynch also dismissed the charges against plaintiff in light of his OTH discharge. (Exhibit T) Plaintiff was discharged from the United States Marine Corps on August 31, 1989. (Exhibit 36).

48. In August, 1989, plaintiff wrote to his Congressman, John P. Murtha, concerning the investigation of RS Pittsburgh and the charges against him, and, in response, Congressman Murtha directed his staff to do an in-depth review. Based on this review, Congressman Murtha personally appealed to the Commandant of the Marine Corps for a thorough and fair investigation into plaintiff's allegations of investigative misconduct. (Exhibit 40).

49. Based on Congressman Murtha's request for a thorough and fair investigation, Lieutenant General C.E. Mundy, Jr. was directed to investigate plaintiff's allegations. By memorandum dated September 28, 1989, General Mundy reported the results of his investigation to the Commandant of the Marine Corps. (Exhibit AA). With respect to the investigation of RS Pittsburgh itself, General Mundy concluded that it was conducted fairly and that justice was served. (Exhibit AA, p.2). In connection with plaintiff's charge that the Evans investigating team used pressure to obtain false witness statements, General Mundy indicates that he placed little credibility in the

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[55] General Lynch gave no reason for the denial of plaintiff's request to withdraw his request for an OTH discharge. He testified at trial that a statement of reasons for the denial was not required.

charge. Nevertheless, he indicates that the charge could not remain unaddressed and required further investigation. (Exhibit AA, p.5).

50. By letter dated December 19, 1989, Congressman Murtha informed plaintiff that the Commandant of the Marine Corps assured him that he would direct an inquiry into the matter, and that the Commandant had recently sent Congressman Murtha the enclosed letter. In the enclosed letter, the Commandant indicates that he was satisfied that the evidence against plaintiff was sufficient to warrant the decision of the Commanding General of the MCRD in Parris Island, South Carolina to refer the charges for trial by general court-martial; that the Commanding General's decision to deny plaintiff's request to withdraw his request for an OTH discharge was appropriate and legal; that neither he nor anyone else in the Marine Corps has the authority to set aside plaintiff's discharge and restore him to duty; that plaintiff's only remedy is to petition the Board for Correction of Naval Records for relief; that plaintiff may file an ethics complaint with the Commandant's Staff Judge Advocate if he believes that the prosecutor engaged in unethical conduct; that the allegations of misconduct by members of the investigating team greatly concerned him; that the complaints against members of the investigating team were not inherently incredible; that he had directed the Commanding General to investigate the claims of investigative misconduct; that he would advise Congressman Murtha of the results of this investigation; and that, assuming there had been investigative misconduct, it had no effect on the ultimate outcome of any of the Pittsburgh cases because the "coerced" statements were not used in

support of any charges against, or considered to the detriment of, the accused. Congressman Murtha suggested that plaintiff may wish to follow the two courses of action suggested by the Commandant in his letter. (Exhibit 40). Despite the Commandant's conclusion that the complaints against members of the investigating team were not inherently incredible, there is no evidence that any further investigation was conducted by the Commanding General.

Conclusions of Law

51. This court has jurisdiction over the parties herein, and has subject matter jurisdiction pursuant to 28 U.S.C. 1331.[56]

52. Turning first to plaintiff's claim against defendants under the First Amendment of the United States Constitution, this claim arises out-of plaintiff's alleged "whistleblowing" activities. Specifically, plaintiff asserts

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[56] Defendants have strenuously argued throughout this litigation that the court lacks subject matter jurisdiction over plaintiff's claims. However, because the relief plaintiff is seeking is limited to declaratory and equitable relief arising out of alleged violations of his constitutional rights, the court concludes that the sovereign immunity of the United States is waived and that the court has subject matter jurisdiction under 28 U.S.C. § 1331. *See, e.g.. Jaffee v. United States*, 592 F.2d 712 (3d Cir.), *cert. denied*, 441 U.S. 961 (1979) (Section 702 of Administrative Procedures Act waives sovereign immunity in "nonstatutory" review of agency action under Section 1331 for "relief other than money damages").

that defendants violated his right to free speech by retaliating against him for reporting the problems in RS Pittsburgh to his superiors.[57] The evidence offered at trial, however, failed to establish that plaintiff was a "whistleblower." As noted in Finding of Fact No. 16, when General Lynch became the Commanding General of the MCRD and the Eastern Recruiting Region in Parris Island, South Carolina in October, 1988, he ordered a detailed briefing on recruiting, which he received in December, 1988. It was apparent from the briefing that something was wrong in RS Pittsburgh, and General Lynch ordered Colonel Casey, his Deputy Chief of Staff for Recruiting, to investigate RS Pittsburgh and "fix it." The court finds credible the testimony of General Lynch that he did not know plaintiff; that he was never

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[57] In connection with plaintiff's First Amendment claim, he also asserts that defendants retaliated against him for communicating with members of the United States Congress about the misconduct engaged in by members of the investigation team during the investigation of RS Pittsburgh for recruiting fraud. However, plaintiff's evidence failed to substantiate this claim. With respect to plaintiff's communication with the late Senator John Heinz, Major C.L. Scovel, III from the Marine Corps Headquarters in Washington, D. C. responded to the inquiry made by Senator Heinz on plaintiff's behalf. There was absolutely no evidence that General Lynch, or any other Marine Corps officer who was involved in the events leading to plaintiff's OTH discharge, had knowledge of plaintiff's communication with Senator Heinz or took any retaliatory action against plaintiff as a result of this communication. As to plaintiff's letter to Congressman Murtha, this communication was made after plaintiff's OTH discharge from the Marine Corps. Therefore, it is difficult to understand how this communication could have resulted in any retaliatory action against plaintiff.

informed that plaintiff had complained about problems in RS Pittsburgh to Master Sergeant Zuro of the 4th Marine Corps District; and that the investigation he ordered was not the result of any "whistleblowing" by plaintiff. With respect to the Evans investigation into recruiting fraud in RS Pittsburgh, the evidence clearly established that this investigation resulted from the allegations made by the recruit named Sens, who reported for basic training from RS Pittsburgh with a bleeding ulcer. Sens alleged that he had informed his recruiter of his medical condition, and that he was told not to say anything about his medical condition to the doctors at the MEPS. Based on these allegations, other recruits from RS Pittsburgh were interviewed, resulting in numerous allegations of recruiting misconduct, including fraud, by the recruiters in RS Pittsburgh. These allegations, rather than plaintiff's complaints, led to the Evans investigation into recruiting fraud.[58] Simply put, there is no basis for finding that plaintiff was a "whistleblower," and the court concludes that he is not entitled to any relief on his First Amendment claim.

53. Next, plaintiff asserts that the conduct of Captain Evans in misleading plaintiff as to whether he was being represented by counsel during the Evans investigation violated his right to counsel under the Sixth Amendment of the United States Constitution. While the

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[58] In this connection, it should also be noted that plaintiff never complained to anyone that recruiters in RS Pittsburgh were engaging in recruiting fraud. Rather, his complaints concerned problems with his Commanding Officer, pending DEP pool discharges and missing documents.

evidence offered at trial supported plaintiff's claim that Captain Evans misrepresented himself to be an attorney with whom plaintiff and others could consult during the Evans investigation, the court concludes that plaintiff has failed to establish that he sustained any harm as a result of such misrepresentation. It is clear that plaintiff's consultation with Captain Evans during the Evans investigation did not result in any incriminating statements.[59] Moreover, prior to the referral of charges against plaintiff in March, 1989, Captain Puleo, a defense attorney at the MCRD in Parris Island, South Carolina, undertook plaintiff's representation at no charge and he provided such representation through August, 1989, when plaintiff was discharged from the Marine Corps. Under the circumstances, the court concludes that plaintiff has failed to establish that he is entitled to any relief on his Sixth Amendment claim.

54. Addressing plaintiff's equal protection claim under the Fifth Amendment of the United States Constitution, the equal protection component of the due process clause of the Fifth Amendment places the same limits on the exercise of federal power that the equal protection clause of the Fourteenth Amendment places on the exercise of state power. *See Cook v. Babbitt*, 819 F.Supp. 1, 11 (D.D.C.1993), *citing*, *Bolling v. Sharpe*, 347 U.S. 497, 500, 74 S.Ct, 693, 695, 98 L.Ed.2d 884 (1954). In essence, the

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[59] In his statement to the Evans investigation team dated February 2, 1989, plaintiff specifically denies engaging in any fraudulent recruiting practices and notes that he reported problems in RS Pittsburgh to the 4th Marine Corps District.

guarantee of "equal protection of the laws" is the requirement that similarly situated persons be treated similarly. *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 439, 105 S.Ct. 3249, 3254, 87 L.Ed.2d 313 (1985). Plaintiff's equal protection claim relates to the preferral of the gambling charge against him. Specifically, plaintiff asserts that gambling was tolerated in the Marine Corps, and that he was selectively prosecuted for this offense, or treated differently from other Marines who engaged in gambling activities, because he asserted his constitutional rights, including his right to free speech and his right to counsel. Although plaintiff offered evidence that gambling took place in RS Pittsburgh in the form of football pools, raffle tickets and the Pennsylvania lottery, and that no one was ever prosecuted by the Marine Corps for participating in such conduct, he fails to recognize that he was not prosecuted for engaging in these types of gambling activities. The evidence clearly established that the gambling charge was not preferred against plaintiff for participating in football pools, buying and selling raffle tickets or playing the Pennsylvania lottery. Rather, the gambling charge was related to plaintiff's alleged "bookmaking" activities. In fact, the gray book, which plaintiff alleges led to his request for an OTH discharge, purportedly recorded plaintiff's bookmaking activities. There was absolutely no evidence that other Marines engaged in "bookmaking" activities and that the Marine Corps chose not to prosecute them. Under the circumstances, the court concludes that plaintiff has failed to establish that he was treated differently than similarly situated Marines, and he is entitled to no relief on his equal protection claim under the Fifth Amendment.

55. Finally, plaintiff asserts a claim against defendants for the violation of his right to procedural and substantive due process under the Fifth Amendment of the United States Constitution. With respect to plaintiff's procedural due process claim, procedural due process imposes constraints on governmental decisions which deprive individuals of liberty or property interests within the meaning of the due process clause of the Fifth or Fourteenth Amendment.[60] The fundamental requirement of procedural due process is the opportunity to be heard at a meaningful time and in a meaningful manner. *See Mathews v. Eldridge*, 424 U.S. 319, 332-333, 96 S.Ct. 893, 902, 47 L.Ed.2d 18 (1976). Based on the evidence offered by plaintiff, the court has little difficulty concluding that the conduct of the military prosecutor during the week preceding plaintiff's scheduled trial by general court-martial violated plaintiff's right to procedural due process under the Fifth Amendment. Specifically, the court finds that Captain Koleos engaged in deceptive conduct in connection with the availability of Staff Sergeant Cummings and the ability of the government to gain possession of the gray book.[61] The court further finds that such

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[60] Defendants do not dispute that plaintiff's constitutionally guarantee liberty and property interests were at stake as a result of the preferral of charges against plaintiff and his scheduled trial by general court-martial.

[61] Although plaintiff asserts that he never kept a gray book, or any other gambling record, the evidence, circumstantially, at least, leads to the opposite conclusion. It seems clear to the court that plaintiff's belief that the gray book would be offered as evidence in his court-martial trial induced him to submit his request for the OTH discharge. If the prosecution offered a forgery, plaintiff, with counsel's assistance, could easily have

deception was improper, and that it was the determining factor in plaintiff's decision to request an OTH discharge in lieu of trial by general court-martial, violating his right for an opportunity to be heard on the charges against him.[62] Accordingly, plaintiff is entitled to a declaratory judgment that defendants violated his right to procedural due process of law under the Fifth Amendment.

56. In addition to declaratory relief, plaintiff seeks equitable relief. The court concludes, however, that the equitable relief available to plaintiff in this case is limited. Clearly, at this time, it is impracticable to vacate General Lynch's August 9, 1989 decision, which denied plaintiff's request to withdraw his request for an OTH discharge, and to order the Marine Corps to proceed with plaintiff's trial by general court-martial. As to plaintiff's request for

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discredited it. The fact that he submitted his request for discharge, presumably with the advice of counsel, after being misled into believing that the gray book would be offered, suggests to the court that he knew that a genuine gray book existed. Moreover, Captain Puleo, who testified at trial, could not be asked to reveal on cross-examination whether plaintiff had disclosed the existence of the gray book to him. He asserted plaintiff's attorney-client privilege.

[62] With respect to plaintiff's evidence establishing that Captain Koleos engaged in misconduct in connection with his report of the telephone interview of Mr. Jerry Williams on March 16, 1989, which resulted in the preferral of the Precision Printing charges against plaintiff, and his evidence establishing that members of the Evans investigation team engaged in misconduct, the court is unpersuaded that these incidents of misconduct were factors in plaintiff's decision to request the OTH discharge in lieu of trial by court-martial. Accordingly, the court declines to find that such misconduct also violated plaintiff's Fifth Amendment right to due process.

reinstatement, it is undisputed that there is no vested property right in future reenlistment in the Marine Corps. Based on the circumstances surrounding the investigation into recruiting fraud in RS Pittsburgh, the court concludes that plaintiff would not have been permitted to reenlist upon the expiration of his last reenlistment period on February 5, 1990. Therefore, defendants will be directed to reinstate for the limited period of time between August 31, 1989, the date of his discharge, and February 5, 1990, the date of the expiration of his last reenlistment period.

57. Turning to plaintiff's claim for backpay, the court is persuaded by the decision of the United States Court of Appeals for the District of Columbia Circuit in *Hubbard v. Administrator, Environmental Protection Agency*, 982 F.2d 531 (D.C.Cir.1992), that the waiver of sovereign immunity in section 702 of the Administrative Procedure Act for "relief other than money damages" does not waive sovereign immunity for an award of backpay. Therefore, the court declines to enter an award of backpay in favor of plaintiff.

58. Plaintiff is entitled, however, to an order directing defendants to expunge the portion of his military records which reflect a reduction in rank and an OTH discharge; to reinstate plaintiff into the United States Marine Corps at the rank of Master Sergeant through February 5, 1990; to restore to plaintiff all rights, honors and privileges of his status as a Master Sergeant in the United States Marine Corps; and to recharacterize plaintiff's discharge as honorable or general using the standards applicable to those discharged at the expiration of their normal term of service.

59. Based on the court's conclusion that defendants violated plaintiff's right to procedural due process, the court finds it unnecessary to address his substantive due process claim under the Fifth Amendment because a finding that defendants also violated plaintiff's right to substantive due process would entitle him to no further relief.

An order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

TERENCE D. MORGAN, Plaintiff, vs. WILLIAM PERRY, in his capacity as Secretary of Defense, JOHN DALTON, in his capacity as Secretary of the Navy; GENERAL C.E. MUNDY, in his capacity as Commandant of the Marine Corps, BRIGADIER GENERAL J.W. CLIMP, in his capacity as Commanding General, Marine Corps Recruit Depot, Eastern Recruiting Region, Parris Island, Defendants.	)	Civil Action No. 91-1064

ORDER

AND NOW, this 24th day of August, 1995, in accordance with the foregoing findings of fact and conclusions of law, it is hereby DECLARED that plaintiff's right to due process of law under the Fifth Amendment of the United States Constitution was violated by defendants. It is hereby ORDERED as follows:

1. Defendants shall take the steps necessary to expunge the portion of plaintiff's military records which reflect a reduction in rank and an OTH discharge;

2. Defendants shall reinstate plaintiff into the United States Marine Corps at the rank of Master Sergeant through February 5, 1990, and defendants shall

restore to plaintiff all rights, honors and privileges of his status as a Master Sergeant; and

3. Defendants shall recharacterize plaintiff's discharge as honorable or general using the standards applicable to those discharged at the expiration of their normal terms of service.

/s/ William L. Standish
William L. Standish
United States
District Judge

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APPENDIX F

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 96-3314

TERENCE D. MORGAN,

Appellant,

v.

SECRETARY OF DEFENSE,

Appellees.

BRIEF OF AMICUS CURIAE AMERICAN CIVIL LIBERTIES UNION OF PENNSYLVANIA

On Appeal from the Order of May 28, 1996, of the United States District Court for the Western District of Pennsylvania at Civil Action No. 91-1064 Which Denied Plaintiff's Motion for Attorney's Fees and Costs under EAJA.

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STATEMENT OF INTEREST OF AMICUS CURIAE

The American Civil Liberties Union (hereinafter referred to as "ACLU") is a non-profit, non-partisan, public-interest organization with over 275,000 members

nationwide. The ACLU's central mission is to protect and support the basic civil liberties of all Americans and to seek the extension of those liberties to groups which, traditionally, have not been protected. Now in its 76th year, the ACLU has been involved in most, if not all, major civil rights battles fought in the nation's courts.

Amicus, ACLU of Pennsylvania, is the affiliate office of the ACLU for this Commonwealth. ACLU of Pennsylvania has been deeply involved in the civil rights litigation conducted in this Circuit. It has appeared before this court numerous times as counsel for a party, as a litigant and as Amicus Curiae.

The instant case calls into question the circumstances under which a prevailing party whose constitutional rights have been violated by agents of the United States military is entitled to an award of attorney's fees pursuant to the Equal Access To Justice Act. The court's decision is likely to impact upon the rights of ACLU clients and the organization itself. Because there are broader interests which may be affected by this case than will be represented by the parties, the ACLU seeks to place its experience and perspective before the court.

STATEMENT OF QUESTION PRESENTED

DID THE DISTRICT COURT MISAPPREHEND AND MISAPPLY THE CONTROLLING SUBSTANTIAL JUSTIFICATION TEST IN ITS DENIAL OF APPELLANT'S REQUEST FOR FEES UNDER EAJA?

ARGUMENT[1]

THE DISTRICT COURT MISAPPREHENDED AND MISAPPLIED THE LAW GOVERNING APPELLANT'S APPLICATION FOR ATTORNEYS' FEES UNDER EAJA

A. INTRODUCTION

After a lengthy non-jury trial, the United States District Court for the Western District of Pennsylvania concluded that Appellant Terence D. Morgan's (hereinafter referred to as "Morgan") Fifth Amendment Due Process rights were violated by Defendants. Specifically, the court found that the actions of the military prosecutor in the week prior to Morgan's scheduled trial by general court martial amounted to egregious unconstitutional prosecutorial misconduct. The court awarded Morgan widespread relief including reinstatement into the Marine Corps at his former rank, expungement of records and a recharacterization of his discharge from OTH to honorable or general.

When, after prevailing on his constitutional claim, Morgan filed an application for fees and costs under the Equal Access To Justice Act, 28 U.S.C. §2412 (hereinafter referred to as "EAJA"), the trial court shifted its attention from an examination of the prosecutor's misconduct to General Lynch's refusal of Morgan's request to withdraw his OTH discharge. Through this shift, the constitutional dimensions of this case were lost and became secondary to actions which were several steps removed from the

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[1] For purposes of this Amicus Curiae brief, the ACLU adopts the Statement of Facts appearing in the brief of Appellant, Terence D. Morgan.

violations giving rise to Morgan's favorable verdict. By focusing on the decision-making of General Lynch, as opposed to the prosecutor who actually violated Morgan's rights, the lower court did not award fees and failed to fulfill the broad remedial purposes behind such fee shifting statutes as EAJA:

> To diminish the deterrent effect of seeking review of, or defending against, governmental action by providing in specified situations an award of attorneys fees, expert witness fees and other costs against the United States, and (2) to ensure the applicability in actions by or against the United States of the common law and statutory exceptions to the "American Rule" respecting the award of attorneys fees.

Congressional Findings and Purposes, Note following 5 U.S.C. §504; *Commissioner INS v. Jean*, 496 U.S. 154, 165, 110 S.Ct. 2316 (1980).

B. THE LOWER COURT ERRED IN ITS APPLICATION OF EAJA

As a prevailing party, Morgan is entitled to an award of attorneys fees "unless the position of the United States was substantially justified or . . . special circumstances make an award unjust." 28 U.S.C. §2412(d)(1)(A).[2] Pursuant to EAJA, the court must determine whether the

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[2] The purpose of EAJA, like other civil rights fee shifting statutes, is to facilitate the representation of citizens who have been victimized by abuses of governmental authority. Recognizing the resource disparities between most individuals and government, the guiding principle behind these statutes is that the availability of a fee award will encourage attorneys to

government's position is "justified in substance or in the main – that is, justified to a degree that could satisfy a **reasonable person.**" ***Pierce v. Underwood,*** 487 U.S. 552, 565, 108 S.Ct. 2541 (1988). This determination requires review of "not only the position taken in the litigation, but the agency position that made the litigation necessary in the first place." ***Taylor v. Heckler,*** 835 F.2d 1037, 1040 (3d Cir. 1987).

As defined in the case law, the substantial justification inquiry is governed by an objective reasonable person standard. Both the conduct giving rise to the litigation and the actual litigation position must survive the "reasonable person" scrutiny. Specifically, the government bears the burden for establishing:

1. a reasonable basis in truth for the facts alleged;

2. a reasonable basis in law for the theory at [sic] propounded; and

3. a reasonable connection between the facts alleged and the legal theory advanced.

Hanover Potato Products, Inc. v. Shalala, 989 F.2d 123, 127 (3d Cir. 1993).[3]

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accept civil rights cases. **See,** ***Blum v. Stenson,*** 465 U.S. 886, 104 S.Ct. 1541 (1984).

[3] The original Third Circuit test required the government to demonstrate "a solid and well founded basis" for its position *Taylor,* 835 F.2d at 1042. After ***Pierce,*** the "reasonableness" standard replaced the "solid and well founded basis" test. ***Hanover,*** 989 F.2d at 127.

One way of ascertaining whether a challenged governmental action would satisfy a reasonable person is to determine whether the Defendant "knew or should have known that his or her conduct violated the Plaintiff's constitutional rights." ***Verney v. Dodaro,*** 872 F.Supp. 188, 198 (M.D. Pa. 1995).[4] The thrust of this inquiry is not on the subjective belief or knowledge of the individual Defendant, but on "the objective reasonableness of a defendant's actions . . . " ***Burns v. County of Cambria,*** 764 F.Supp. 1031, 1037 (W.D. Pa. 1991); **app. dismissed**, 971 F.2d 1015 (3d Cir. 1992); citing, ***Anderson v. Creighton,*** 483 U.S. 635, 107 S.Ct. 3034 (1987) That a Defendant acts in "good faith" is not sufficient. ***Behrens v. Pelletier,*** ___ U.S. ___, 116 S.Ct. 834, 838 (1996); ***Parkhurst v. Trapp,*** 77 F.3d 707, 712 (3d Cir. 1996). Objective reasonableness is measured by "whether a reasonable person could have believed the defendant's actions to be lawful in light of clearly established law", ***Parkhurst,*** 77 F.3d at 712, and the facts reasonably available to the actor or decision-maker. ***Guiffre v. Bissell,*** 31 F.3d 1241, 1252 (3d Cir. 1994).

When the instant Defendants' actions are viewed in the context of the substantial justification standard, as explicated by the qualified immunity cases, there can be no doubt that those who perpetrated the breach of Morgan's right to due process of law should have known that what was being done violated precious rights. **See,** ***Pro v. Donatucci,*** 81 F.3d 1283, 1287 (3d Cir. 1996). The district court found that Morgan's rights were violated by the

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[4] Although ***Verney*** is a 42 U.S. C. §1983 qualified immunity case, the court's focus on the reasonable person makes the analysis useful in the EAJA-substantial justification context.

military prosecutor who deceptively induced him to withdraw his court martial request through material misrepresentations of fact. At the time the prosecutor communicated his factual misrepresentations, a reasonable person would have known that his actions were unlawful.

The Supreme Court recognized the important role of fairness on the part of government lawyers as far back as in 1935:

> The United States Attorney is the representative not of an ordinary party to a controversy, but a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor – indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. **It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.**

Berger v. U.S., 295 U.S. 78, 88, 55 S.Ct. 629 (1935) (emphasis added). The duty of fairness on the part of the prosecutor has remained a constant over the years. ***Santobello v. New York***, 404 U.S. 257, 261, 92 S.Ct. 495 (1971) (the constitutional system of justice "presupposes fairness in securing an agreement between an accused and a prosecutor."); ***Brady v. Maryland***, 373 U.S. 83, 83 S.Ct.

1194 (1963) (requiring the disclosure of exculpatory material).

Having determined that it was the prosecutor's conduct which violated Morgan's rights, it was incumbent upon the court to subject that conduct to substantial justification scrutiny. Yet, the district court's 14 page memorandum opinion contains no discussion of whether the government had a reasonable basis in truth for the facts alleged in defense of the prosecutor's conduct; of whether there was a reasonable basis in the law for maintaining that the prosecutor's misrepresentations were not unlawful; or of whether the government articulated a reasonable connection between the facts alleged and the legal theory advanced. ***Hanover Potato Products, Inc.***, 989 F.2d at 127.

In summary, the lower court failed to subject the constitutional violation it found to have occurred to the analysis required by ***Hanover Potato Products, Inc.***. As a reasonable person would have known that the complained of conduct was unlawful, application of the appropriate test would have yielded a fee award in favor of Morgan.

Furthermore, by focusing on General Lynch's refusal to allow Morgan to withdraw his OTH discharge, the lower court converted the case from one with constitutional implications to a statutory appeal under the APA. Pursuant to the APA, the lower court restricted its review, thus narrowing the parameters within which the case had proceeded through trial. Morgan was prejudiced by this shift in that it improperly deflected attention from those who were primarily responsible for the violation giving rise to liability.

Assuming, arguendo, that it was proper for the lower court to consider the decision-making of Lynch, the court misapplied the controlling test. The memorandum opinion establishes that the court looked to Lynch's actions with an eye as to what knowledge was in Lynch's possession. Such a subjective determination, however, was improper. The inquiry should have been objective – what would a reasonable person have known under the circumstances. ***Hanover Potato Products, Inc.*, supra; *Parkhurst*, supra.** As is fully explored in the brief submitted by Morgan, Lynch would have had actual knowledge of the constitutional injury had he conducted a reasonable inquiry designed to fully advise him of the facts. His apparent desire to be kept in the dark about relevant facts cannot shield the government in this instance.[5]

CONCLUSION

For the foregoing reasons, Amicus Curiae, ACLU of Pennsylvania, requests that the order denying Morgan attorneys' fees be reversed and that the case be remanded for a determination of a reasonable fee award.

Respectfully submitted,

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[5] It is precisely for this reason that the substantial justification standard is an objective, not subjective one.

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CERTIFICATION OF ADMISSION

It is hereby certified that the attorneys whose names appear below are members in good standing of the United States Court of Appeals for the Third Circuit

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CERTIFICATE OF SERVICE

I, Jon Pushinsky, do hereby certify that a copy of the attached document was mailed to counsel listed below on the 21st day of November, 1996.

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APPENDIX G

THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 96-3314

TERENCE D. MORGAN,

Appellant,

vs.

WILLIAM PERRY, in his capacity as Secretary of Defense; JOHN DALTON, in his capacity as Secretary of the Navy; GENERAL C.E. MUNDY, in his capacity as Commandant of the Marine Corps; BRIGADIER GENERAL J.W. CLIMP, in his capacity as Commanding General, Marine Corps Recruit Depot, Eastern Recruiting Region, Parris Island,

Appellees.

BRIEF OF THE ALLEGHENY COUNTY BAR ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT

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IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 96-3314

TERENCE D. MORGAN,

Appellant

vs.

WILLIAM PERRY, in his capacity as Secretary of Defense; JOHN DALTON, in his capacity as Secretary of the Navy; GENERAL C.E. MUNDY, in his capacity as Commandant of the Marine Corps; BRIGADIER GENERAL J.W. CLIMP, in his capacity as Commanding General, Marine Corps Recruit Depot, Eastern Recruiting Region, Parris Island,

Appellees.

BRIEF OF THE ALLEGHENY COUNTY BAR ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT

STATEMENT OF INTEREST

The Allegheny County Pennsylvania Bar Association (ACBA) is a voluntary organization of lawyers. Its more than 6,000 members represent a broad cross-section of the legal profession. The ACBA's Board of Governors unanimously authorized the filing of an amicus brief in this case. The ACBA's membership includes lawyers who represent plaintiffs on a fee-shifting basis, lawyers who represent plaintiffs on a contingency basis, and lawyers who represent defendants.

The ACBA's interest in this case flows from its concern that promulgating a standard of review in actions putatively eligible for an award of attorney's fees under the Equal Access to Justice Act, 28 U.S.C. § 2412(d)(1)(A), that gives undue deference to the government's claim that its position was substantially justified would create a likelihood that litigants opposing federal government action would be denied effective legal counsel in all but a small number of cases.

STATEMENT OF JURISDICTION

The ACBA defers to the jurisdictional statements of the parties.

STATEMENT OF THE ISSUES

1. Whether the district court abused its discretion in denying Morgan's petition under the Equal Access to

Justice Act without a thorough examination of the government's conduct?

Suggested Answer: Yes.

STANDARD OF REVIEW

In a case brought under the Equal Access to Justice Act, 28 U.S.C. § 2412, the district court's determination that the government's action was substantially justified is reviewed for abuse of discretion. *Pierce v. Underwood*, 487 U.S. 552 (1988). An abuse of discretion arises when the district court's decision rests upon a clearly erroneous finding of fact, an errant conclusion of law, or improper application of law to facts. *Hanover Potato Products, Inc. v. Shalala*, 989 F.2d 123, 127 (3d Cir. 1993).

STATEMENT OF RELATED CASES

The ACBA is not aware of any related cases.

STATEMENT OF THE CASE

1. *Nature of the Case*

This case involves a civil action brought by Terrence D. Morgan, a former Master Sergeant in the United States Marine Corps, seeking declaratory and injunctive relief to redress violations of his constitutional rights by William Perry, Secretary of Defense; John Dalton, Secretary of the Navy; General C.E. Mundy, Commandant of the Marine Corps, and Brigadier General J.W. Climp, Commanding General, Marine Corps Recruit Depot, Eastern Recruiting

Region, Parris Island, in regard to his discharge from the Marine Corps in 1989.

2. *Course of Proceedings*

Morgan commenced this action in 1991. On August 24, 1995, following a lengthy non-jury trial, the U.S. District Court for the Western District of Pennsylvania entered an order in Morgan's favor and against the government holding the government had violated Morgan's rights under the Due Process Clause of the Fifth Amendment to the United States Constitution and granted Morgan declaratory and equitable relief. Morgan then filed a petition for fees under the Equal Access to Justice Act, 28 U.S.C. § 2412, seeking $408,547.67. The district court denied the fee petition by order dated May 3, 1996 on the grounds that the government's position was substantially justified. Morgan filed a timely notice of appeal from the district court's order.

3. *Statement of Facts*

In this civil action, Morgan, sought declaratory and injunctive relief to redress alleged violations of his constitutional rights by defendants. Morgan's complaint arose out of his "other than honorable" (OTH) discharge from the Marine Corps in August, 1989 prior to scheduled trial by general court-martial for alleged violations of the Uniform Code of Military Justice. Charges were preferred against Morgan after investigations into alleged recruiting fraud at the Marine Recruiting Station (RS) in Pittsburgh, Pennsylvania. Morgan's complaint asserted that both the investigation in general and proceedings

against him in particular were tainted by wide-ranging government misconduct, including but not limited to knowing procurement and use of perjured testimony, intimidation of defense witnesses, and unethical conduct by the military prosecutor.

After a lengthy non-jury trial, the district court determined that Morgan's right to due process of law under the Fifth Amendment to the United States Constitution had been violated as a result of the military prosecutor's misconduct. Morgan then filed a fee petition under 28 U.S.C. § 2412(d). The government opposed the petition on the grounds that the position of the United States was substantially justified and that special circumstances made an award unjust.

The district court held the government's pre-litigation and litigation positions were substantially justified and therefore denied the claim for attorney's fees. The court reasoned that since General Lynch, who had convened the General Court-Martial, had ordered an investigation into Morgan's allegations, his decision to accept the recommendation of the investigator that the prosecutor's misconduct was not a causative factor in Morgan's request for an "other than honorable" (OTH) discharge prior to trial "had a reasonable basis in both law and fact." See district court opinion May 3, 1996 (attached as Appendix A) at 13 and 14.

As for the government's litigation position, the court agreed with the government that the determination that Captain Koleos, the military prosecutor, violated Plaintiffs right to due process under the Fifth Amendment was based upon a "credibility determination." The district

court had credited the testimony of Captain Puleo, Morgan's assigned military defense counsel who uncovered the majority of the misconduct alleged in Morgan's Complaint.

The district court reasoned that although Captain Puleo had been either not credited or ignored by the government, this did not compel a finding that General Lynch lacked a reasonable basis to fail to take action when confronted with the misconduct of his prosecutor or that the government's decision to litigate the issue was not substantially justified.[1]

SUMMARY OF THE ARGUMENT

Congress sought to achieve three inter-connected goals through enactment of the Equal Access to Justice Act: to provide an incentive for private parties to contest government overreaching; to deter subsequent government wrongdoing; and to provide more complete compensation for citizens injured by government action. All three goals require the district court conduct a searching inquiry into the merits of the government's pre-litigation and litigation positions. Here, the district court begins and ends its inquiry by accepting the government's rationalization for its pre-litigation position, namely that military officers did not believe that wide-ranging government misconduct was a causative factor in Morgan's

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[1] Based on this conclusion, the district court did not address the government's alternative argument that special circumstances made an award of fees unjust.

request for an other than honorable discharge. The district court fails to consider evidence of government misconduct that it either found corroborated or, indeed, found credible in the underlying litigation, and therefore failed to follow the policy of strict scrutiny of the government's position this Court outlined in *Hanover Potato Products v. Shalala*, 989 F.2d 123 (3d Cir. 1993). If district courts are not required to conduct a searching inquiry into the merits of the government's position before finding the substantial justification threshold is met, litigation that the EAJA sought to promote will not be promoted, unreasonable government conduct will not be deterred, and the goal of compensating victims of government misconduct will not be realized.

ARGUMENT

I. THE SALUTARY PURPOSES OF THE EAJA ARE FURTHERED BY A SEARCHING INQUIRY INTO THE MERITS OF THE GOVERNMENT'S POSITION.

A. Purposes of the EAJA

The Equal Access to Justice Act (EAJA), 28 USC § 2412, provides in relevant part:

> § 2412. Costs and fees
>
> * * *
>
> (d)(1)(A) Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases sounding in tort), including proceedings for

> judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.
>
> * * *

28 U.S.C. § 2412(d)(1)(A).

Through the Equal Access to Justice Act, Congress sought to achieve three interconnected goals: to provide an incentive for private parties to contest government overreaching, to deter subsequent government wrongdoing, and to provide more complete compensation for citizens injured by government action. Krent, *Fee Shifting Under the Equal Access to Justice Act – A Qualified Success*, 11 Yale L & Pol'y Rev. 458 (1993) (hereinafter Krent, *Fee Shifting* at___).

First, Congress intended to reduce the disparity in resources between individuals, small businesses, and other organizations with limited resources and the federal government thereby "encourag[ing] relatively impecunious private parties to challenge unreasonable or oppressive government behavior by relieving such parties of the fear of incurring large litigation expenses." Sisk, *The Essentials of the Equal Access to Justice Act: Court Awards of Attorney's Fees for Unreasoned Government Conduct (Part One)*, 55 La. L. Rev. 217, 225 (1994) (hereinafter "Sisk, *Essentials of EAJA (Part One)* at ___").

Second, Congress sought to deter wrongful behavior by federal officials anticipat[ing] that the prospect of

paying sizable awards of attorneys' fees when they overstepped their authority and were challenged in court would induce administrators to behave more responsibly in the future." *Spencer v. NLRB*, 712 F.2d 539, 550 (D.C. Cir. 1983), *cert denied*, 466 U.S. 936 (1984). At the same time, Congress did not want the prospect of paying attorney's fees to "chill public officials charged with enforcing the law from vigorously discharging their responsibilities." Sisk, *Essentials of EAJA (Part One)* at 225-226 (quoting H.R. Rep. No 120 99th Cong. 1st Sess. 10 (1985)). Accordingly, rather than prescribing mandatory fee awards against the government whenever it lost a case, the EAJA adopts the "middle ground" approach of authorizing a fee when the government's position is found to be without substantial justification. The "substantial justification" standard "balances the constitutional obligation of the executive branch to see that the laws are faithfully executed against the public interest in encouraging parties to vindicate their rights." Sisk, *Essentials of EAJA (Part One)* at 226 (quoting H.R. Rep. No 1418, 96th Cong. 2 Sess. 10 (1980)).

Finally, although the legislature history focuses upon the first two purposes as primary, Congress also undoubtedly intended to compensate parties who had been wronged by the government, thus allowing "those injured by the government to receive complete compensation for their injuries, including litigation expense." Krent, *Fee Shifting* at 477. Thus, the EAJA serves "a salutary function in creating the appearance of fairness" by providing more complete compensation to those who have suffered a breach of the public trust through the

arbitrary and unreasonable use of government power. *Id.* at 478.

It is rare indeed that a district court will encounter wide-ranging government misconduct on the scale found here. If this Court allows the fee petition to be dismissed because this misconduct was ended only by a "credibility determination" made by the district court, the purposes of the EAJA will be frustrated.

Additionally, it is difficult to imagine a more "impecunious party" than a wrongfully discharged serviceman, or larger litigation expenses than those incurred in a civil rights action such as this.[2] It has been acknowledged by even the highest military court that lack of resources forecloses a number of avenues to servicemen in vindicating constitutional rights. *See, United States v. Cole,* 24 M.J. 18 (CMA 1987).

If the district court's position prevails, an administrator can simply hide behind the actions of a subordinate, or assign a subordinate to investigate allegations of misconduct, and no private attorney will challenge the result. As the Supreme Court stated, "[t]he specific purpose of the EAJA is to eliminate for the average person the financial disincentive to challenge unreasonable government action." *Commissioner v. Jean,* 496 U.S. 154, 163 (1990). The district court's rationalization of the government's conduct will clearly deter challenges to government action.

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[2] The ACBA takes no position on whether the fees incurred were reasonable.

B. Substantial justification must involve a totality of the circumstances analysis rather than post-hoc rationalization of government conduct

In *Hanover Potato Products, Inc. v. Shalala*, 989 F.2d 123 (3d Cir. 1993), this Court stated in relevant part:

> Substantial justification under the EAJA has been defined by the Supreme Court as "justified in substance or in the main – that is, justified to a degree that could satisfy a reasonable person." [*Pierce v. Underwood*, 487 U.S. 552, 565 (1988)]. Alternatively phrased, an agency position is substantially justified if it has a reasonable basis in both law and fact. *See Id.*
>
> The burden of demonstrating substantial justification for its position rests *squarely* on the government agency. *Dougherty v. Lehman*, 711 F.2d 555, 561 (3d Cir. 1983). Before *Pierce* was decided, we held that for the government to meet its burden, it must show:
>
> > 1. a solid and well-founded basis in truth for the facts alleged; 2. a solid and well-founded basis in law for the theory it propounded; and 3. a solid and well-founded connection between the facts alleged and the legal theory advanced.
>
> *Taylor v. Heckler*, 835 F.2d 1037, 1042 (3d Cir. 1987) (quoting *Garcia v. Schweiker*, 829 F.2d 396, 399 (3d Cir. 1987). (footnote omitted). *Pierce*, of course, adopted a reasonableness standard for substantial justification. Accordingly, we will no longer require a "solid and well-founded" basis, but rather a reasonable basis only. Nevertheless, the basic framework enunciated by *Garcia* as

modified by *Pierce*, is still the correct statement of the law of substantial justification.

Moreover, under 28 U.S.C. § 2412(d)(2)(D), "the position of the United States" includes not only the position taken in the litigation, but the agency position that made the litigation necessary in the first place. *Taylor*, 835 F.2d at 1040 (quoting *Lee v. Johnson*, 801 F.2d 115, 116 (Becker, J., dissenting sur denial of petition for rehearing)). Thus, unless both the agency's litigation and prelitigation positions meet the modified three-part criteria of *Taylor*, the government's position is not substantially justified. *Taylor*, 835 F.2d at 1042.

* * *

Hanover Potato Products, 989 F.2d at 128.

Applying the reasonableness standard to the present case, the district court concluded that defendants' prelitigation and litigation positions were substantially justified.

An analysis of the purposes of the EAJA and *Hanover Potato Products* establishes that the district court's legal analysis is flawed and hence, its denial of the fee petition constitutes an abuse of discretion. This Court should reverse the district court to insure than [sic] a stricter, more searching scrutiny of the government's positions is undertaken before the threshold of substantial justification is found to have been met.

C. This Court strictly scrutinized the government's conduct in Hanover Potato Products

Hanover Potato Products involved a claim for fees where the district court had found that plaintiff, producers of potato products, were a qualified prevailing party under the EAJA after it had, through litigation, caused the courts to strike down a Food and Drug Administration (FDA) regulation. The FDA was required to repromulgate the regulation in accordance with proper comment procedures under the Administrative Procedures Act and its own regulations.

The district court held that the government's position was, however, substantially justified because the basis for the invalidation of the regulation, the failure of the FDA to provide a complete administrative record for review during the "comment period" had not caused the litigation nor prejudiced Hanover. The government pointed out the administrative record had never been examined by Hanover and therefore it could not have been prejudiced by the failure to supplement the record. The government also offered three other defenses for its positions. *Hanover Potato Products*, 989 F.2d at 126.

Although acknowledging the abuse of discretion standard, this Court held it was not "factually reasonable" for the agency to take the position that Hanover suffered no prejudice through the failure of the FDA to provide a complete record during the comments period. *Id.* at 129. The Court went on to state that the position of the FDA was also unreasonable on legal grounds because of the policy consideration involved in denying the interested public the opportunity to review the complete

record. *Id.* at 130, n. 9. The Court also stressed that "a district court must consider not only the agency's litigation position, but the agency's prelitigations actions as well." *Id.* at 130. The court noted the district court failed to consider the agency's conduct, which resulted in the FDA promulgating a regulation with an insufficient public record, and committed a legal error by focusing on Hanover's behavior in not obtaining the record.

In summary, the *Hanover Potato Products* court indicated that the district court erred by failing to determine whether, "as a whole the government's position was substantially justified." *Id.* at 131. The court went on to hold that, as a matter of law, the government's position was not substantially justified and remanded with an order to the district court to enter a fee award in favor of Hanover. *Id.* at 133. In so doing, this Court was mindful of the Supreme Court's admonition in *Pierce* that "substantially justified" meant "more than merely undeserving of sanctions for frivolousness." *Pierce*, 487 U.S. at 566.

D. Denying fees without considering government conduct as a whole will deter the litigation the EAJA sought to promote.

1. Egregious government misconduct militates against justification.

The district court's failure to closely examine the government's conduct **as a whole**, if not corrected by this Court, would have a chilling effect on the ability of individual private litigants, such as Morgan, to obtain counsel to challenge governmental action. The district court's decision would mean in effect that no matter how

egregious the government misconduct, if the district court is able to distill one rationalization, such as the argument that this case involved a "credibility determination," and on that basis alone deny fees under the EAJA, no private attorney will accept such a case regardless of the chances of success or the merits of the claims.

A "totality of the circumstance" approach requires the district court to balance all aspects of the case and consider all issues in reaching a singular holistic appraisal of the government's position. Sisk, *The Essentials of the Equal Access to Justice Act: Court Awards of Attorney's Fees for Unreasonable Government Conduct (Part Two)*, 56 La. L. Rev. 1, 12 (1995). Once such a searching analysis is undertaken, the district court must be cognizant of the purposes of the EAJA, especially the goal of deterring government misconduct. This Court should require district courts to consider the entire record with these considerations in mind. "[A] particularly egregious example of misconduct might, even confined to a narrow but important issue, taint the government's position in the entire case as unreasonable." Sisk, *Essentials of EAJA (Part Two)* at 13, n. 58 (quoting *Roanoke River Basin Ass'n v. Hudson*, 991 F.2d 132, 139 (4th Cir. 1992), *cert. denied*, 114 S. Ct. 182 (1993)). An unreasonable stance taken on a single issue might undermine the overall reasonableness of the government's position because of its significant effect on the entire civil action. *Id.*

In this case, through extensive pre-trial discovery on [sic] attorneys were able to uncover a wide-ranging pattern of misconduct against Morgan. Plaintiff's attorney knew Morgan's claims would be corroborated by the testimony of a senior military member, Captain (new

Major) Puleo, who, as more fully set forth below, had previous dealings with the misconduct of these Defendants in similar circumstances. The ability to prove serious allegations of government misconduct should carry with it a reasonable expectation of fees.

The district court, in the first instance, ignored the cumulative effect of the government misconduct in its disposition of the fee petition, although in its decision on the merits, the court considered a number of the misconduct allegations to be credible and to have been corroborated at trial. Several incidents of misconduct were found to be corroborated, although not essential to the ultimate decision on the merits. Although the substantial justification inquiry may not require an independent investigation, the justification analysis cannot be divorced from the district court's reasoning on the underlying merits. *Sisk, The Essentials of the EAJA (Part Two)* at 24.

The record in this case clearly indicates that the government's pre-litigation position, a refusal to deal with allegations of prosecutorial misconduct which Defendants admitted were not "inherently incredible," when viewed as a whole, was unreasonable. However, the district court completely failed to consider these issues. The court indicated that it was unpersuaded that the incidents of misconduct were factors in Morgan's decision to request a discharge in lieu of trial, but the district court should have considered these factors in determining whether the government's pre-litigation position was substantially justified. Factors such as showings of dishonesty in the underlying government conduct

create a powerful presumption against substantial justification. *Linn v. Chivatero*, 790 F.2d 1270 (5th Cir. 1986); Sisk, *Essential of EAJA (Part Two)* at 43.

2. An especially strong showing of justification should be required for prolonged and complex litigation.

It is especially daunting for Morgan to find a private attorney to undertake a case such as this where litigation would be prolonged and complex. As a panel of the District of Columbia Circuit noted:

> [T]he longer and more complex the course of litigation necessary to vindicate his position, the more hesitant a private party will be to defend his interests, even if an eventual finding that the government's position was not substantially justified would result in reimbursement of his costs of counsel. The rational litigant will realize that, the more protracted the proceedings the more he stands to lose if **either** he does not prevail on the merits or his position for fees is denied . . . Sensitivity to the central objective of the [EAJA] – reduction of the deterrents to challenges of unreasonable government conduct – thus suggests that, in categories of cases in which substantial investments of effort and money commonly are required to prosecute suits to their ultimate conclusions, the government should be obliged to make an especially strong showing that its persistence in litigation was justified.

Spencer v. National Labor Relations Board, 712 F.2d 539, 560 (D.C. Cir. 1983), *cert denied*, 466 U.S. 936 (1984).

The legislative history of the EAJA provides additional support for this position. The committee reports accompanying the original legislation stated that "where a party has had to engage in lengthy administrative proceedings before final vindication of his or her rights in the courts, the government should have to make a strong showing to demonstrate that its action was reasonable." *See* Sisk, *Essentials of the EAJA (Part Two)* at 59, n. 343 (citing H.R. Rep. No. 1418, 96th Cong. 2 Sess. 18 (1980); S. Rep. No. 253, 96 Cong. 1 Sess. 21 (1979).

E. Allowing post-hoc rationalization will not deter unreasonable government conduct.

Allowing a district court to find the government's position to be substantially justified through either post-hoc rationalization or a less than searching inquiry into government conduct as a whole will frustrate the EAJA policy of deterring government misconduct.

Here, the failure to examine the conduct of the government as a whole, and to rely on the government's rationalization that it simply made an inaccurate "credibility determination" regarding prosecutorial misconduct, ignores the deterrent goal of the EAJA and allows a clearly documented problem to continue.

A mere *six months* before the events giving rise to allegations of retaliating against and intimidating defense witnesses by the Parris Island Marine Corps Command described in Morgan's Complaint, the Parris Island Command was involved in a widespread effort to retaliate against witnesses in three prosecutions occurring at the Parris Island base itself. In at least two cases, the Navy

Marine Court has found that court-martials were tainted by prosecutorial misconduct. *United States vs. Jones*, 30 M.J. 849 (NMCMR 1990) ("Jones I"); *United States v. Jones*, 33 M.J. 1040 (NMCMR 1991); *United States v. Jameson*, 33 M.J. 669 (NMCMR 1991).

At the *Jameson* court-martial in July, 1988, two Marines testified as character witnesses on behalf of the defendant. Immediately thereafter, while the *Jones* court-martial was pending, the prosecutor and the acting staff judge advocate had the two witnesses' testimony transcribed and then, after a meeting with other officials at Parris Island, had the two witnesses relieved of their duties as drill instructors and had unfavorable fitness reports issued to them. *See, Jones*, 30 M.J. at 851.[3] *See also, Jameson*, 33 N,H, at 671. A number of witnesses testified they were reluctant to testify in the *Jones* court-martial because they feared retaliation and would not believe assurances that they would not themselves suffer retaliation. *Jones*, 30 M.J. at 851-853. In fact, a commander at Parris Island compounded the problem by "encouraging" Marines to testify as defense witnesses but warning them that if their testimony deviated from "Marine Corps policy . . . they would be held accountable for it." *Jameson*, 33 M.J. at 669.

Congress believed future conduct of government officials would be affected by EAJA awards. Without a searching, thorough analysis, the conduct of the government goes unscrutinized, contrary to the wishes of the authors of the EAJA.

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[3] Captain Puleo was Jones' defense counsel.

F. The goal of compensating victims of government misconduct requires a searching analysis of government conduct.

Finally, evaluating government conduct as a whole in determining whether substantial justification exists for the government's pre-litigation and litigation positions will vindicate EAJA's goal of compensating individuals for expenses incurred in defending against unreasonable government action. This purpose arguably is distinct from mitigating the deterrent effect of litigation. Krent, *Fee Shifting*, at 478; *see also Berman vs. Schweiker*, 713 F.2d 1290, 1295 (7th Cir. 1983). As such, an overall evaluation of the government's position must be made to vindicate the rights of EAJA petitioners. Morgan here has incurred more than $300,000 in legal fees to obtain an honorable discharge. Surely, the finding of the district court on the merits that "Plaintiffs right to due process of law under the Fifth Amendment to the United States Constitution" had been violated requires an award of EAJA fees. This is especially important for servicemembers in the light of the Supreme Court's holdings in *Chappel v. Wallace*, 462 U.S. 296 (1983); *U.S. v. Johnson*, 481 U.S. 681 (1987), and *U.S. v. Stanley* 483 U.S. 669 (1987), which all but eliminated the possibility of obtaining monetary damages for violations of their constitutional rights. In fact, both *Chappel* and *Johnson* point to other remedies allegedly available to servicemen to vindicate their constitutional rights. *Chappel*, 462 U.S. at 302-305; *Johnson* 481 U.S. at 689-690.

As one of the supporters of the EAJA stated on the Senate floor:

> And there is not a Member of this body who has not found on his or her doorstep citizens who have been wronged by their own Government. At worst, a career or a life may be ruined; at best, the individual has been wrongly accused and has had to incur great expense to clear his name . . . Equal Access to Justice made the promise of justice to these people who had gone to great expense to challenge agency wrong, or who had successfully defended themselves against wrongful agency action.

131 Cong. Rec. S9998 (daily ed. July 24, 1985) (Statements of Sen. Bumpers).

Although the government rationalizes its conduct as a mere determination of credibility contrary to that reached by the district court, an examination of the record as a whole points to the almost indisputable conclusion that Morgan was an [sic] victim of prosecutorial misconduct who should be compensated, if only marginally, by an award of fees under the EAJA.

CONCLUSION

For any or all of the foregoing reasons, the order of the district court denying fees under the Equal Access to Justice Act should be reversed and the case remanded with directions to enter an order awarding reasonable attorney fees to Plaintiff, Terrence D. Morgan.

Respectfully submitted,

OGG, JONES, CORDES & IGNELZI, L.L.P

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Dated: November 14, 1996

APPENDIX H

[p. 1] IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

TERENCE D. MORGAN,
Plaintiff CA 91-1064

vs.

SECRETARY OF DEFENSE,
Defendant

PROCEEDINGS

Transcript of TRIAL commencing on December 27, 1994, United States District Court, Pittsburgh, Pennsylvania, before Honorable William Standish, District Judge.

APPEARANCES:

For the Plaintiff: James Lieber, Esq.
Arthur Denberg, Esq.
Jean Clickner, Esq.

For the Defendant: Albert Scholiaert, Esq.
Edward Duffy, Esq.

Reported by:
William E. Weber, RMR
Official Court Reporter
1027A, U.S. Courthouse
Pittsburgh, Pa. 15219
(412) 261-2446

Proceedings recorded by mechanical stenography. Transcript produced by computer-aided transcription.

[p. 2] (Open court)

THE COURT: Mr. Lieber, Mr. Morgan is here this morning, so we are able to go, are we?

MR. LIEBER: Yes. If I could say one thing off the record?

THE COURT: Sure. (off record)

TERENCE DUANE MORGAN, having been first duly sworn, testified as follows:

DIRECT-EXAMINATION

BY MR. LIEBER:

Q. Good morning, Terry. Would you state your full name again for the record, please?

A. Yes, my name is Terence Duane Morgan.

Q. You might want to move the microphone lower and closer to you. Would you state your address please?

A. My current address is 217 Sunview Avenue, Jeanette, Pennsylvania.

Q. And your date and place of birth?

A. I was born June 1, 1956 in Duquesne Hospital, Pennsylvania.

Q. Where were you educated, sir?

A. Grades one through six, Manor Elementary School. Grade seven through nine, West Hempfield Senior-Junior High School. Grades 10 through 12 was Hempfield Area Senior High School.

* * *

[p. 106] A. I believe in October the latter part of '88.

Q. And in the Marine Corps, what – who was permitted to fill out travel claims?

A. The owner-operator, what the regulations say.

Q. So it can be either one?

A. Yes.

Q. Now, there is also a charge here for gambling activities?

A. Yes.

Q. Now, was anyone, any other Marine in the RS charged with any gambling activities?

A. Not that I'm aware of.

Q. Now, to your – how many years were you in the Marine Corps before you were charged with this gambling activity?

A. Fifteen and a half.

Q. And you served both abroad and in the Continental United States?

A. Yes.

Q. During that time period, was any other Marine ever charged with gambling activity in your experience that you knew of?

A. No, not that I knew of.

Q. Now –

A. Wait a minute, there was one. He wasn't actually charged. There was an investigation. What was that?

[p. 107] A. That was on Major Walsh.

Q. What happened with Major Walsh?

A. In –

Q. Major Walsh was the Commanding Officer?

A. Major Walsh was the Commanding Officer at the time. Corporal Barksdale who worked in the supply room made charges of discrimination and gambling against Major Walsh to the Fourth Marine Corps District headquarters and Colonel Roy Deforest was the director at the time. There was an inquiry done to this because Major Walsh was gambling with the recruiters and NCOIC's on a weekly and monthly basis for cases of beer. And he had supplied the beer, 15 or 16 cases of beer at one time in the supply room where Corporal Barksdale worked.

Corporal Barksdale was upset he was not promoted, brought the charges against Major Walsh.

Q. What happened, was Major Walsh disciplined in any way?

A. Nothing happened to my knowledge.

Q. What happened, did anything happen to Barksdale?

A. Corporal Barksdale was subsequently transferred to district in Philadelphia.

Q. Now, what I would like you to describe from, to your knowledge, what sort of gambling was going on in Recruiting Station Pittsburgh and who was involved in it?

A. All kind of gambling was going on. Throughout the Marine [p. 108] Corps gambling goes on. We were having football pools, holding raffles. We played the Lotto every day. Individual bets by recruiters.

There was tickets being sold for various functions, you know, softball teams, churches, youth homes, things to that nature.

Q. Did the Marine Corps itself have any lotteries it held?

A. Yes, it did.

Q. What were they?

A. The Marine Corps sold a raffle ticket for the purpose of subsidizing the Marine Corps Ball. And when we were in Philadelphia at the NCOIC course, we were trained two hours of training on how to gamble for our Atlantic City trip which was part of the itinerary the NCOIC brief was written up in.

Q. There was formal training in a federal facility?

A. This was formal training at Philadelphia Naval base given. The first time I received it was by Captain Ferguson. It was on the itinerary. We received two hours of training because we made a trip to Atlantic City. A lot of people, including myself, had never been to a gambling facility like that. They showed us how to gamble.

Q. What do you mean they showed you how?

A. They brought in pamphlets from Atlantic City. They showed us what machines to play even, what not to play. They showed us how to play blackjack.

[p. 109] Q. Now, in terms of the gambling in the Fourth Marine Corps District while you were there, who engaged in it?

A. Gambling at the Fourth Marine Corps District while I was there.

Q. First at the recruiting station in Pittsburgh, who engaged in it?

A. Major Walsh.

MR. DUFFY: I object. Lay foundation of his knowledge of the gambling.

THE COURT: All right. Lay a foundation for it.

BY MR. LIEBER:

Q. How do you know how these people were, that these people were involved?

A. Because I gambled with them.

Q. Who did you gamble with in Recruiting Station Pittsburgh, or see gambling?

A. Staff Sergeant Johnson ran a football pool. Myself, Captain Kaufman, Gunny Lemro, Master Sergeant Zuro, Master Sergeant Cawman, Staff Sergeant Cummings, Sergeant Major Hooper, Corporal Palmer, Sergeant Horton, that is all I can remember at this time. Sergeant Major Rozek.

Q. How about from the district or the district contact team, who did you either gamble with or see gambling?

A. Well, when we went to Atlantic City, everybody that was there on the contact team gambled plus all the

NCOIC at the [p. 110] meeting. When the contact team came to Pittsburgh in their visits, we always played the Lotto. All of us would throw in a couple of dollars and try to hit it big.

Q. Who from the contact team played the Lotto?

A. Master Gunnery Sergeant Zuro, Gunny Parsons, Captain Hoffman, Captain Ferguson when he was the contact team officer. That is who I remember from the contact team.

Q. I'm going to show you Exhibit 17 which has been admitted which is the pretrial advice, July 1989. Specifically, I am going to show you a portion number four which says maximum permissible punishment. I would like you to read that to yourself?

THE COURT: The date of that?

MR. LIEBER: Sorry, Your Honor. That is July 1, 1989.

MR. SCHOLLAERT: I think that is incorrect.

MR. DUFFY: Can't be correct. The IO report was –

THE COURT: You can't read the date.

MR. LIEBER: We believe July 7, 1989.

BY MR. LIEBER:

Q. Now, on page two there is a paragraph four says "maximum permissible punishment."

A. Yes, sir.

Q. What was the maximum punishment that you were being [p. 111] exposed to?

A. Dishonorable discharge, confinement for 35 years and six months, forfeiture of all pay, and allowance reduction to lowest enlisted pay grade.

Q. When you received this between your first Article 32 on April 2nd, 1989 and your reception of this pretrial advice on or about July 7th, 1989, did you know of any new facts or evidence or any circumstances that would lead the punishment to go from NJP to maximum punishment, from NJP to maximum of 35 years?

A. No, I did not.

Q. How did you, how did receiving that pretrial advice affect you?

A. It affected me tremendously. I thought that the fabrication was never going to stop and I was going to end up in the brig no matter what.

Q. I am going to show you pretrial advice from G.W. Jones about Staff Sergeant Cummings, refer you to paragraph three and ask you to read that to yourself. What is his maximum pretrial exposure?

MR DUFFY: I object to what exhibit we are speaking of

MR LIEBER: It was admitted as part of the G.W. Jones, I'm not necessarily going through the whole exhibit.

THE COURT: What number?

[p. 112] MR. DUFFY: What number, so I can see what you are showing the witness?

MR. LIEBER: I think it might be part of Exhibit 24.

THE COURT: We don't have 24 admitted anyway. At least I don't have it marked as admitted in my list.

THE CLERK: This list.

THE COURT: Admitted? Tell me.

THE CLERK: Yes, Judge, it is.

MR. DUFFY: We have it being admitted.

THE COURT: You do. All right.

THE CLERK: On the 19th of December.

THE COURT: I have it admitted in my notes, just not my list.

BY MR. LIEBER:

Q. Now, what was the maximum punishment that Staff Sergeant Cummings was exposed to?

A. Maximum punishment could be adjudicated to trial by court-martial for offenses alleged against the accused includes a punitive discharge.

MR. DUFFY: I object. These are two different documents. There is not a 34 advice letter. This is a recommendation –

THE COURT: This has to do with request for separation in lieu of trial.

[p. 113] MR. DUFFY: Yes, Your Honor, part –

THE COURT: I don't see what that, that doesn't indicate what the maximum possible penalty is for court-martial, doesn't deal with a court-martial.

MR. DUFFY: Does not show because it is not required to show.

THE COURT: I assume if, –

MR. LIEBER: Says the maximum punishment that could be adjudged at trial by court-martial for the offenses alleged against the accused includes a punitive discharge.

MR. DUFFY: That is one of the included punishment.

THE COURT: Included, doesn't say that is the maximum possible.

MR. DUFFY: Part of the requirements for good of service discharge is punitive.

THE COURT: That is dishonorable discharge, punitive discharge part of what the witness here is saying was the maximum possible punishment. This doesn't purport to say what other punishment, doesn't even say what the charges would be, does it?

MR. LIEBER: Yes, it does say what the charges would be.

THE COURT: What would they be?

MR. DUFFY: Paragraph two of the document lists the charges pending against Staff Sergeant Cummings.

[p. 114] THE COURT: All right.

MR. DUFFY: Various specs, charge –

THE COURT: Conspiracy to affect unlawful enlistment.

MR. DUFFY: One spec under 81, two under 84.

THE COURT: Enlistment of ineligible persons willful dereliction, wrongful use of cocaine. It doesn't say what period of incarceration would be involved.

MR. DUFFY: No, Your Honor, not included in this document. This document is not a 34 advice letter. Comparing apples and oranges.

MR. LIEBER: I think the Court can review the document in any way it wishes. The document doesn't suggest any time. It says pretrial confinement –

THE COURT: Clearly for these charges there would be some, under the Uniform Code –

MR. DUFFY: Your Honor, I can cite –

THE COURT: Some possible penalty would include a sentence of incarceration.

MR. LIEBER: Clearly, Your Honor, but what this shows is that Mr. Cummings was not being exposed to any incarceration.

THE COURT: He doesn't say that. This has to do with, what will happen to him if he takes other than honorable discharge. They are not comparable.

[p. 115] MR. LIEBER: All right.

THE COURT: If we got the letter, there may be, probably was a pretrial advice letter issued to Cummings if charges were ever preferred against him. I don't know they were.

He may have opted to request separation in lieu of trial by court-martial before that ever happened. I don't know.

I assume what happens here in the military is somewhat analogous to what happens in a Federal Court. When an indictment is filed, the U.S. Attorney files memorandum which includes what the charges are and maximum possible punishment. That, I assume, is what this Exhibit 17 is.

MR. LIEBER: All right.

BY MR. LIEBER:

Q. Do you know of any – let me ask you this. In terms of the people who gambled, did Cummings ever gamble?

A. Yes, he did.

Q. Now, at some point he suggested something that you paid for triple sevens. Could you recall something about triple sevens, can you recall a situation where there was a pay out for triple sevens?

A. Yes, myself and Staff Sergeant Cummings won triple sevens on the Pennsylvania Daily Lottery Number.

Q. Where was the money paid?

[p. 116] A. At the A-Plus in Jeanette where the ticket was purchased.

Q. Did you ever – what sorts of gambling did you engage in or see, engage in with Cummings or see Cummings engage in?

A. Cummings played the Daily Lottery Number. We all played the same number, so we played together. Cummings purchased a high school reunion ticket from me. Cummings purchased a softball ticket from me.

Q. A lottery also?

A. Off the Pennsylvania Daily Lottery Number.

Q. Okay.

A. A raffle ticket. And Cummings, I mean, he would buy every ticket he could. Cummings gambled more than anybody I ever seen.

Q. Was the payout on the raffle ticket higher than payout on the daily number?

A. It depended on what ticket you purchased. There are so many tickets going around, one ticket would pay out 200, one would pay 1,200, depends what you purchased.

Q. Did you buy tickets from the Democratic Party at some point?

A. Yes, we did.

Q. In Westmoreland County was there ever any prosecution of lotteries to your knowledge of raffles?

A. To my knowledge, no.

Q. Were you ever questioned by law enforcement authorities?

[p. 117] A. No, I bought tickets from the Fraternal Order of Police.

Q. Did you ever have an arrest for gambling?

A. Never.

Q. Now, I realize we have a situation where there are apples and oranges, but what you see there is that Cummings was being exposed for the good of the service or for whatever reason to at most a punitive discharge –

MR. DUFFY: Object to characterization for what Cummings was at most –

THE COURT: Furthermore I don't know what this goes to. I don't think this witness, see this Exhibit Number 24 before he opted to, had seen, before he elected to take a discharge. This is after the fact. Not what he perceived at the time he was, he went through the discharge, is it? If it isn't, I don't see why it is relevant.

MR. LIEBER: I was going to ask him does he know of any reason he would be dealt with so disparately from Cummings.

THE COURT: Can't you argue that? This witness' opinion about that.

MR. LIEBER: Withdraw that question.

BY MR. LIEBER:

Q. Now, at some point some issue of a gray book came up. Do you recall that?

A. Yes, I do.

[p. 118] Q. Did you have a gray book?

A. Did I have a gray book?

Q. Yes.

A. No, I never had a gray book.

Q. And how did you learn of this gray book?

A. Major Puleo told me that Staff Sergeant Cummings and Captain Koleos had a gray book. It was –

Q. It was what?

A. It is referred to as a gray book, referred to as many things.

Q. What effect did that have on you?

A. What effect did that have on me?

Q. Yes. That they had it?

A. The day before my general court-martial?

Q. Yes.

A. Well, that was, this was just the last straw, this was it. It was quite apparent that the Marine Corps was not going to stop fabricating evidence against me. It is quite apparent that a lot of the evidence has been proven it is fabricated. I was told even if I wanted a general court-martial that I would not be reenlisted and my career was over.

MR. DUFFY: I object. I move to strike that as he was told by who?

THE COURT: It doesn't matter. This, I think, has to do with his perceptions at the time he elected to take the [p. 119] less than honorable discharge and for

whatever reasons he believed these things, he is saying what he believed.

MR. DUFFY: Yes, Your Honor.

THE WITNESS: I was very concerned with my wife's health. I was away from my family for a while. This was just the last straw. If they had a gray book, either Staff Sergeant Cummings had made it or Captain Koleos had made it. That was my perception. It wasn't going to stop. It wasn't going to end. I couldn't win.

I knew that my career was over. I just, I gave up. I quit. I had a moment of weakness and I just said enough is enough, I just want it all to end.

MR. LIEBER: This is Plaintiff Exhibit 35. The request to withdraw the administrative discharge. I show you this. This, I believe we stipulated they could be admitted.

THE COURT: Didn't this come in before?

MR. LIEBER: I was looking for that. It may have come in through Major Puleo if it came in.

THE COURT: Yes. Exhibit 25 if you look at it. Look at Exhibit Number 20, see what that is.

MR. SCHOLLAERT: Exhibit 20.

MR. LIEBER: All right. We withdraw this exhibit then. It is number 20.

THE COURT: Exhibit 20 isn't admitted according to my notes. It is the same thing.

[p. 120] MR. LIEBER: I believe we agreed this is admissible. Do you have any objection to admitting the exhibit?

THE COURT: Do you have it marked as admitted?

THE CLERK: No, I don't, Judge.

MR. DUFFY: Just this was submitted, this was the claim of Master Sergeant Morgan, but as far as the truth of the matter of the object contained therein.

THE COURT: It is an official document filed in connection with a court-martial proceedings at the time of the court-martial proceedings. It seems to me, unless there is an objection to authenticity, it can come in.

MR. LIEBER: All right. We move its admission.

THE COURT: Admitted.

BY MR. LIEBER:

Q. The following day you submitted this document; is that correct, after you submitted your OTH?

A. Yes, sir.

Q. And why did you the following day move to withdraw your OTH?

A. Two days prior to that I had two very emotional days with my wife. She came down to Parris Island. I think we both agreed that justice was not going to be served here. There were other circumstances involved. We knew of other people that were involved that weren't being punished, weren't being [p. 121] processed. There were no charges being preferred against them.

It just appeared that nothing we did was making any relevance. So, it also appeared anybody that had anything to do with trying to help me or tell the truth was subjected to major punishment.

Q. Such as?

A. Corporal Palmer who tried to tell the truth. Sergeant Horton who tried to tell the truth. And myself who had been trying to tell the truth for the entire time. That is two individuals that I know that surely endangered their careers by trying to help me.

THE COURT: Every now and then we get this. Sounds like we are getting the, probably a good time to end for the day anyway. It is five o'clock. Maybe that is a message. We will take a recess now. (Court adjourned)

* * *

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APPENDIX I

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

TERENCE D. MORGAN Plaintiff, vs. SECRETARY OF DEFENSE, Defendant.	)	CA No. 91-1064 Pittsburgh, Pennsylvania December 12, 1994 9:30 a.m.

TRANSCRIPT OF NONJURY TRIAL
UNITED STATES DISTRICT COURT
BEFORE THE HONORABLE WILLIAM STANDISH

APPEARANCES:

For the Plaintiff:	James Lieber, Esq. Arthur Denberg, Esq. Jean Clickner, Esq.
For the Defendant:	Albert Schollaert, Esq. Edward Duffy, Esq.
Court Reporter:	Jordan Lilienthal 4724 Coleridge Street Pittsburgh, PA 15201

Proceedings recorded by mechanical stenography transcript produced by notereading.

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Witnesses:	Direct	Cross	Re-Direct	Re-Cross
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EXHIBITS

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[p. 129] an extraordinary appeal in accordance with Article 69, sir I could not file that extraordinary appeal due to the fact as I had run out of time in the Marine Corps.

I was later discharged with an RA-1-A, the highest reenlistment code possible, but not allowed to reenlist, sir.

Q Thank you.

A You're welcome, sir.

THE COURT: Thank you very much.

MR. LIEBER: Nothing further.

(Whereupon, the witness was excused.)

MR. LIEBER: At this time we are going to read from a deposition. First the plaintiff will read a section, and then the defense will read a section.

This is the deposition of Jerry L. Williams, May 11, 1993, and this was taken in Cumberland, Maryland. Jerry Williams is the proprietor of Precision Printing.

We will read the following sections for the plaintiff: page 44, line 16, through 54, line 15; page 55, line 18, through 60, line 24.

And that would be in conjunction with Exhibit 1, which we will give to the court. Page 66, line 6, through 67, line 16; 68, line 9, through 69, line 12; and page 76, line 14 through 25.

Plaintiff's Deposition 1 is already Plaintiff's

* * *

[p. 136] Basically I told him that, well, he asked me if I had ever met him before. I said not to the best of my knowledge. He asked me if I remember him ever coming to the shop and doing diplomas for him. I said no.

He said they are trying to prosecute me for things. I said I know that because they had specifically named Terry as one of the people who had done that and who wanted me to identify him. They asked me specifically to identify Terry Morgan.

"Q Did you feel that the prosecutor was accusing Terry Morgan?

"A More so than the other names?

"Q Yes.

"Q What gave you that idea?

"A Well, there were names to be mentioned, and that name was mentioned more than all of the others.

"Q Any other names that you can remember?

"A A lot of names that you mentioned, Seltzer, Evans, all of those names, Feren, all of those names were mentioned. But the name that was mentioned more often than not was Terry Morgan.

"Q Did you ever feel the prosecutor was attempting to implicate Terry Morgan?

"A That was the prosecutor's job.

[p. 137] "Q So you did feel that?

"A Not only to implicate Terry Morgan but to implicate anyone who was involved. I felt he was doing a very thorough job. He was doing his job.

"Q But did you think he was trying to use you personally to implicate Terry Morgan in wrongdoing, trying to get you to say something negative about Terry Morgan in regard to wrongdoing?

"A Yes.

"Q Okay. Why do you say that?

"A Well, it seems to me like he was trying to get the prosecution thrust on him more than other names. It seems as though, yes, this guy had done this. We want to get him, you know.

But it seems to me like they felt Terry was more involved than just getting the diplomas made. It seems to

me they felt like he was the one that put together the whole scheme of things.

"Q Did they tell you why they felt that way?

"A No.

"Q Before the photographs were presented to you and Terry Morgan was at your place of business in Bedford, did you ever indicate to Koleos or any other investigators that you did not have knowledge regarding Terry Morgan or you didn't know anything about Terry Morgan?

[p. 138] "A I told him I did not know Terry Morgan. I could not say for sure he was the one, that he was one of the ones involved. I never said it was Morgan.

There was someone who called me and asked me questions – I don't remember the name of that person – about doing these diplomas and asked me questions. I think that person also asked me if I could create color diplomas. I don't know why.

But I am positive that person was the person driving the car that day.

"Q That was the Altoona call?

"A I think it was from Altoona. It may have been from Ebensburg. Whoever was driving that car was the one who called me. I don't know why I know that. I seem to know that.

I think it had something to do with the young kid that came in here and had the name set – he said his sergeant had called. I don't remember the name of the sergeant.

If I remember correctly the prosecutor was trying to say that was Terry Morgan who had done all that. It was Terry Morgan who had called me and Terry Morgan who had driven the car. I think that is what was trying to be proven. They were trying to get me to be the one to prove that or link that together. And I couldn't do it. This is [p. 139] all a long time ago.

"Q Did Koleos present a question, statement to you at any point for your signature?

"A Yes.

"Q Did you refuse to sign the statement?

"A Yes.

"Q Why was that?

"A Because it was not accurate.

"Q In what regard?

"A Well, they had Terry Morgan named in there and some other names as having driven the car and things like that. And I couldn't – I wouldn't sign it because I didn't actually identify him.

"Q Was it after you had refused to sign that statement that you made the phone call to Terry Morgan?

"A Yes.

"Q That was because you felt you had to warn him that they were trying to make you say things against him that you couldn't say?

"A Yes.

"Q Was that statement mailed to you, faxed to you, or did Koleos present it in person?

"A I don't remember.

"Q Did he bring it with him on the day the identifications – I call it identifications – the day that [p. 140] Morgan was there?

"A I don't remember. But I do remember seeing a statement. I do remember that was not faxed to me. We didn't have a fax machine at that time. It was not mailed to me because I don't have a copy of it. I would have kept a copy of it along – of it somewhere along the line if it was presented to me.

"Q Did he attempt to get you to sign this statement in any way after you said you could not identify Terry Morgan?

"A It was not after the fact he got it. It was prior to the investigation process that he asked me to sign it.

"Q You had never given Koleos the idea that you would sign such a statement in the first place?

"A I told him I would sign a statement regarding the facts as I remembered them, and it is a statement that was presented to me. If it did not contain the facts as I remembered them, I would not sign it. I did not sign it.

"Q Did you tell him that?

"A Yes. He promptly withdrew the statement.

"Q Did he put any pressure on you to implicate Morgan at any time?

"A No.

"Q All right. Did he indicate in any way he would notify the FBI?

"A I was told that if I was not – if I didn't help them [p. 141] to the best of my ability, well, it was really somewhere along the lines of that, that it was told to me, that I was also under investigation. It was possible I had been involved.

Even the newspaper clippings and everything seemed to indicate that I was actively involved in making these diplomas, and I would possibly be charged.

"Q Did they threaten you with being charged?

"A I was told it was a possibility that the FBI was going to be notified.

"Q Koleos told you that?

"A Yes.

"Q Did he tell you at the same time that you were presented with the statement?

"A No. It was in the very beginning.

"Q Did he ever indicate to you that there would be adverse publicity with regard to Precision Printing's business?

"A No.

"Q All right. Were you ever told the government might not lease space from you for recruiting offices?

"A No. That was a personal fear I had.

"Q Was it grounded on any evidence or information or communications?

"A No.

[p. 142] "Q Did any recruiter threaten you during the course of the investigation?

"A I think that it was used once or twice during the typesetting of the name. It was kind of implied when this thing comes about for us to sign again, we are going to make sure it gets signed and everything, referring to the lease.

"Q Do you recall who that was?

"A No, I don't remember. I was never threatened.

"Q You never told Koleos that Morgan had threatened you if you didn't do these forms, that you would lose your lease?

"A I think I told the defending attorney that was one of my fears, that if I didn't – I don't think that I told him it was grounded on any basis in fact.

It was just a fear. I think the main thing, I was afraid of being implicated for making counterfeit diplomas.

"Q I am going to show you Deposition Exhibit No. 1.

"(Whereupon, Deposition Exhibit No. 1 was marked for identification.)"

MR. LIEBER: That would be Trial Exhibit 7.

Question:

"Q Who was this from?

"A That was from the prosecutor.

"Q Yes. There is his statement. What I would like you to do is take a moment and review this statement which is

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APPENDIX J

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

TERENCE D. MORGAN,

Plaintiff

vs.

RICHARD B. CHENEY, et al.,

Defendant

Civil Action
No. 91-1064

PROCEEDINGS

Transcript of Excerpts of Koleos commencing on January 5, 1995, United States District Court, Pittsburgh, Pennsylvania, before Honorable William Standish, District Judge.

APPEARANCES:

For the Plaintiff: By: James Lieber, Esq.
Jean Clickner, Esq.

For the Defendant: By: Albert Schollaert, Esq.
Major Edward Duffy, Esq.

Reported by:
William E. Weber, RPR, CM
Official Court Reporter
1027A, U.S. Courthouse
Pittsburgh, Pa. 15219
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Proceedings recorded by mechanical stenography. Transcript produced by computer-aided transcription.

* * *

[p. 38] Cross-Koleos

MR. LIEBER: That's correct. Your Honor.

MR. SCHOLLAERT: Your Honor, on the same vein, the government believes the rest of this NIS interviews should also be admitted for the same limited purpose.

THE COURT: Fine with me. We can do that. I don't want to hold up –

MR. SCHOLLAERT: They already have been previously identified Plaintiff Exhibit 16-A through G. If they don't want to admit them, I would be happy to reassign them –

THE COURT: No, any objection to 16-A through G?

MR. LIEBER: As long as on the same basis, the hearsay is not taken for the truth.

MR. SCHOLLAERT: These were available in that time period in 1989.

THE COURT: All right.

CROSS-EXAMINATION

BY MR. SCHOLLAERT:

Q Good afternoon Mr. Koleos, how are you?

A Good afternoon.

Q You indicated that Cummings had told you that he had Morgan's gray book, correct?

A Yes.

Q That is not what he testified to under your direction at the Article 32 hearing on June 30th, 1989, however, was it?

[p. 63] A No.

Q Did you tell him before his client filed the other-than-honorable discharge that Cummings did not have the gray book?

A No, what I told him was Cummings was in possession of the gray book.

Q Now, you were aware that Morgan had, in fact, approached a Master Gunnery Sergeant Zuro about pool problems in 1988, were you not?

A Yes, at some juncture I became aware of that. There was a discussion between Master Gunnery Sergeant Zuro and Master Sergeant Morgan.

Q And, in fact, it was the discussion between Master Gunnery Sergeant Zuro and Mr. Morgan that started the whole evolution of the situation unraveling in Pittsburgh, was it not?

A That is not my understanding.

Q Well –

A Actually it started with Private George Sens down at Parris Island.

Q What I would like you to do is look at page 268 and read your testimony to yourself from line 16 to 22. You are welcome to read the prior page too if you would like.

A Okay.

Q You said there that I think that is how the whole

* * *

APPENDIX K

Results of interview of Mr. Jerry Williams. Owner of Precision Printing. Bedford, Pennsylvania.

On 16 March 1989, I contacted Mr. Williams by calling his business telephone number, (814) 623-8600. I identified myself as the Deputy Staff Judge Advocate. Eastern Recruiting Region, Marine Corps Recruit Depot. Parris Island, SC and asked him if I could talk with him concerning allegations that his printing business was the point of contact for recruiters at Recruiting Station Pittsburgh, Pa. to have high school diplomas made for prospective applicants.

Mr. Williams stated that Master Sergeant Terence D. Morgan, U. S. Marine Corps called his print shop located in Cumberland, Maryland sometime in November or December 1988. Mr. Williams stated that MSgt Morgan called either (301) 724-1076 or 1077 from Altoona, Pa. He said MSgt Morgan needed to get a diploma for an applicant who couldn't pass high school but was nevertheless qualified to enlist. MSgt Morgan wanted Mr. Williams to amend or change the name on an original diploma by type setting another person's name and pasting it over the name on the original diploma and then make a photostatic copy of the altered diploma. Mr. Williams told MSgt Morgan that he would only make a type set of the person's name and that MSgt Morgan could do whatever he wanted with it.

Mr. Williams stated that MSgt Morgan drove to his printing shop in Bedford, Pa. (which is located approximately 30 miles from Mr. Williams Cumberland, Maryland shop), had a corporal drop off the information inside

the office, and returned a few hours later to pick-up and pay for the type set from the outside window. Mr. Williams stated that the same scenario occurred a few days later. A few days after MSgt Morgan picked-up and paid for the second type set he returned to the Bedford printing shop, went in and requested from Mr. Williams' wife to prepare type sets (all types were requested to be done in "Old English" script) on 8-10 more names. Mr. Williams told MSgt Morgan, through his wife, that he would not do any more type sets. Upon hearing this MSgt Morgan tried to persuade Mr. Williams into doing them. Mr. Williams stated that MSgt Morgan knew that he owned the building in which the Armed Services rented office space for recruiting efforts in the Bedford area and tried to subtly pressure him into making the type sets. Mr. Williams refused to make the type sets as requested by MSgt Morgan.

Mr. Williams stated that he would receive calls from other recruiters, including those from other services, on a periodic basis.

Mr. Williams state that his wife and other employees could positively identify MSgt Morgan and the corporal who accompanied him if they saw them again.

D. J. KOLEOS

PLAINTIFFS EXHIBIT 7